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In the Supreme Court of the United States

WALTER W. KELLEY, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF RICKY WAYNE BRACEWELL,

Petitioner,

v.

RICKY WAYNE BRACEWELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The commencement of a bankruptcy case creates an estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case," and of "[p]roceeds * * * of or from property of the estate." 11 U.S.C. § 541(a)(1), (a)(6). In interpreting the predecessor to § 541, this Court held that a financial interest acquired by the debtor after the commencement of bankruptcy constitutes property of the bankruptcy estate if "it is sufficiently rooted in the pre-bankruptcy past." *Segal* v. *Rochelle*, 382 U.S. 375, 380 (1966). The question presented in this case is:

Whether a crop bailout payment received by the debtor pursuant to legislation enacted by Congress after the debtor's filing for bankruptcy, but predicated entirely upon pre-petition events, is property of the bankruptcy estate under this Court's decision in *Segal* and 11 U.S.C. § 541(a)(1) or (a)(6).

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OPINIONS BELOW

The majority and dissenting opinions of the Eleventh Circuit (App., *infra*, 1a-43a) are reported at 454 F.3d 1234. The district court's opinion (App., *infra*, 44a-64a) is reported at 322 B.R. 698. The bankruptcy court's opinion and order (App., *infra*, 65a-73a) are reported at 310 B.R. 472.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2006. On September 12, 2006, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including October 27, 2006. On October 10, 2006, Justice Thomas further extended the time for filing a petition for a writ of certiorari to and including November 26, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, 11 U.S.C. § 541(a) provides:

> The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> * * * * *
>
> (6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

STATEMENT

Filing a bankruptcy petition under the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, triggers the creation of an estate comprising, *inter alia*, the debtor's legal or equitable interests in property as of the commencement of the case and proceeds of or from property of the estate. 11 U.S.C. § 541(a)(1), (a)(6). The central issue in this case is whether a crop bailout payment authorized by Congress after a debtor files for bankruptcy, but predicated entirely upon the debtor's pre-petition crop losses, constitutes part of the estate against which creditors – including those who lent money to grow the crops – may recover.

In *Segal* v. *Rochelle*, 382 U.S. 375 (1966), this Court established a test to determine whether financial interests acquired post-petition but predicated on pre-petition events became property of the bankruptcy estate under the former Bankruptcy Act. In that case, the debtors had suffered significant losses before they filed their bankruptcy petition, but they did not become entitled to a tax refund under the Internal Revenue Code until after bankruptcy had commenced. This Court determined that the tax refund, although paid post-petition and legally not available to the debtors until after the petition date, belonged to the bankruptcy estate: "[W]e believe [the loss-carryback refund claim] is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as 'property'" of the estate. *Id.* at 380. The tax refund should be included within the bankruptcy estate, the Court further explained, because the debtors had completed all conduct necessary to trigger entitlement to the refund (payment of taxes in previous years and incurring losses in the year of bankruptcy) at the time they filed for bankruptcy protection. *Ibid.* That the debtors could not claim the refund until after the petition date did "not disqualify [the] interest as 'property.'" *Ibid.*

Since *Segal*, this Court and numerous lower courts have continued to apply *Segal*'s "sufficiently rooted" test to ascertain whether interests that become available to debtors post-petition belong to the bankruptcy estate. See, *e.g.*, *Kokoszka* v. *Belford*, 417 U.S. 642, 645-648 (1974); *United States* v. *Kennedy*, 2000 WL 1720962, at *4 (2d Cir. 2000) (unpublished); *In re Shearin*, 224 F.3d 346, 351 (4th Cir. 2000); *In re Williams Bros. Asphalt Paving Co.*, 1995 WL 316799, at *1 (6th Cir. 1995) (unpublished); *In re Ryerson*, 739 F.2d 1423, 1426 (9th Cir. 1984); *Charts* v. *Nationwide Mut. Ins. Co.*, 300 B.R. 552, 557-558 (D. Conn. 2003); *Hoseman* v. *Weinschneider*, 277 B.R. 894, 899 (N.D. Ill. 2002), aff'd on other grounds, 322 F.3d 468 (7th Cir. 2003); *In re Tomaiolo*, 2002 WL 226133, at *3 (D. Mass. 2002) (unpublished); *In re Doemling*, 127 B.R. 954, 957 (W.D. Pa. 1991).

The courts of appeals are divided on whether *Segal*'s "sufficiently rooted" test remains the law under the present Bankruptcy Code, which was enacted in 1978. In the instant case, the Eleventh Circuit joined the Fifth Circuit in answering that question in the negative. App., *infra*, 12a; see *In re Burgess*, 438 F.3d 493, 498 (5th Cir. 2006) (*en banc*); see also *In re Vote*, 276 F.3d 1024, 1026 (8th Cir. 2002) (limiting *Segal* to tax refunds). Four other circuits continue to apply *Segal*'s sufficiently rooted test after the passage of the Bankruptcy Code. See *Kennedy*, 2000 WL 1720962, at *4; *Shearin*, 224 F.3d at 351; *Williams Bros. Asphalt Paving Co.*, 1995 WL 316799, at *1; *Ryerson*, 739 F.2d at 1426.

The instant case presents but one example of the variety of contexts in which *Segal*'s test applies. Here, after the debtor filed for bankruptcy, Congress authorized a bailout for farmers with certain crop losses but tied eligibility to the debtor's pre-petition activities. More particularly, a debtor's entitlement to a payment turned on his having planted crops in a covered pre-petition year, and the amount of the payment was measured by the debtor's pre-petition crop losses. Thus, payments were predicated entirely upon prior conduct. Under

Segal, the crop bailout payment would belong to the bankruptcy estate as it is "sufficiently rooted in the pre-bankruptcy past" to constitute estate property. 382 U.S. at 380.

A. The Bankruptcy Court And District Court Proceedings

1. In November 2000 and May 2001, respondent Ricky Wayne Bracewell planted 273 acres of seed wheat and approximately 374 acres of seed cotton. App., *infra*, 2a. Drought conditions during 2001 resulted in a substantially reduced crop yield. *Ibid.* Respondent had incurred significant farm-related debts to produce the crop, and the low yield left respondent unable to meet his financial obligations to his creditors. *Ibid.*

Respondent filed a Chapter 12 bankruptcy petition in the United States Bankruptcy Court for the Middle District of Georgia on May 29, 2002. App., *infra*, 2a. Under Chapter 12 of the Bankruptcy Code, which at the time of respondent's bankruptcy was available only to family farmers with regular annual income, a debtor proposes a plan of reorganization that pledges some part of three years of post-petition income in exchange for the restructuring of his debts. See 11 U.S.C. § 1222(a)(1), (c). If the debtor successfully makes all the payments required under the plan, he receives a discharge of the debts provided for in the plan. See *id.* § 1228(a). In contrast to Chapter 12, a Chapter 7 debtor receives a discharge of debts as of the date of the commencement of bankruptcy and generally has no post-petition obligations to his pre-petition creditors. See *id.* § 727(b) (providing a Chapter 7 debtor with a discharge of "all debts that arose before the date of the order for relief").

While respondent's Chapter 12 case was pending, several members of Congress pursued well-publicized efforts to enact legislation that would compensate farmers like respondent for

drought-related crop losses.[1] App., *infra*, 22a. On July 26, 2002, Senator John Thune introduced the Emergency Farmer and Rancher Assistance Act of 2002, H.R. 5310, 107th Cong., which proposed financial payments to farmers with weather-related crop losses in 2001 and 2002, but Congress recessed before enacting the legislation. App., *infra*, 22a-23a. Respondent converted his case to Chapter 7 on January 2, 2003 (*id.* at 2a), at which time the bankruptcy court appointed petitioner as the Chapter 7 trustee of respondent's bankruptcy case.

Shortly thereafter, Congress continued its efforts to compensate farmers for crop losses. Those efforts culminated in the passage of the Agricultural Assistance Act of 2003, Pub. L. No. 108-7, div. N, Tit. II, 117 Stat. 538, on February 20, 2003. App., *infra*, 3a. As with the legislation introduced in 2002, the Act authorized emergency financial assistance to farmers with weather-related crop losses in 2001 or 2002. The law allowed farmers to receive a payment based on losses incurred in one of the two years. Respondent applied for his payment on January 30, 2004, electing to use his pre-petition 2001 crop losses to calculate his entitlement under the relief program. *Ibid.* He received $41,566. *Ibid.*

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[1] Over the past several decades, such bailouts were relatively common. The Disaster Payments Program, a federal program in place from 1973 to 1981, paid out more than $3.4 billion to farmers with crop losses. Bruce L. Gardner, *American Agriculture in the Twentieth Century: How It Flourished and What It Cost* 228 (2002); E.C. Pasour, Jr. & Randal R. Rucker, *Plowshares and Pork Barrels: The Political Economy of Agriculture* 231 (2005). After the Program formally ended in 1981, Congress authorized *ad hoc* funding for bailout payments from 1988 to 1994, and again from 1998 through 2001. Gardner, *supra*, at 229; Pasour & Rucker, *supra*, at 232. The regularity of these payments led one commentator to conclude that "farmers have come to depend on both crop insurance and disaster payments, which together allow for covering up to 95 percent of the value of their crops." Gilbert M. Gaul, Dan Morgan & Sarah Cohen, *Farmers' Bumper Crop of Federal Dollars: Subsidized Insurance and Disaster Payments*, Wash. Post, Oct. 15, 2006, at A1.

2. Petitioner (the bankruptcy trustee) filed a motion with the bankruptcy court seeking a determination of whether the crop bailout payment belonged to the bankruptcy estate. Petitioner argued for inclusion of the disaster payment in the bankruptcy estate either as property of the estate under 11 U.S.C. § 541(a)(1)[2] or as proceeds of estate property under 11 U.S.C. § 541(a)(6). For purposes of the motion's resolution, the parties stipulated to the facts. App., *infra*, 2a.

The bankruptcy court issued its memorandum opinion on May 20, 2004 (App., *infra*, 65a-72a), and ruled that the bailout payment constituted property of the estate under § 541(a)(1). *Id.* at 72a. The court recognized that, at the commencement of the case, respondent retained "the *right* to the 2001 crop disaster payment, however contingent it may have been." *Id.* at 71a. That contingent right, which included the right to all government disaster payments tied to the pre-petition crops, vested upon passage of the Agricultural Assistance Act of 2003. *Id.* at 71a-72a. The court reasoned that the right to receive the disaster payment did not depend on future post-petition activities on the respondent's part, but rather "stemmed from an inchoate right he acquired pre-petition." *Id.* at 72a. The court noted the inequity of permitting respondent to benefit personally from the disaster

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[2] 11 U.S.C. § 541(a)(1) includes in the bankruptcy estate "all legal or equitable interests of the debtor in property as of the commencement of the case." Respondent's bankruptcy case began as a Chapter 12 proceeding, thus triggering 11 U.S.C. § 1207(a)(1), which supplements the estate with "all property of the kind specified in such section [541] that the debtor acquires after the commencement of the case but before the case is * * * converted to a case under chapter 7." Accordingly, the bankruptcy estate in this case expanded to include post-petition property acquired until conversion to Chapter 7 on January 2, 2003. Because respondent did not receive the crop disaster payment at issue in this proceeding until 2004, after the date of the Chapter 7 conversion, § 1207 had no immediate effect on the issue presented here. See App., *infra*, 3a n.1. Accordingly, petitioner will refer to the date of the Chapter 7 conversion as the petition date.

payment "while avoiding paying the creditors whose extension of credit funded the 2001 crop." *Ibid.*

The bankruptcy court did not, however, include the bail-out payment in the estate under § 541(a)(6). App., *infra*, 71a. It held that proceeds under § 541(a)(6) must flow from property in existence on the petition date and that, in this case, the diminished 2001 crop did not generate proceeds because it did not exist at the commencement of the case. *Ibid.*

3. Respondent appealed to the United States District Court for the Middle District of Georgia. The district court treated petitioner's brief in opposition as a cross-appeal of the bankruptcy court's ruling that the crop bailout payment was not proceeds of estate property under § 541(a)(6). App., *infra*, 47a. The district court ruled that the payment belonged to the debtor individually and not to the bankruptcy estate under either § 541(a)(1) or (a)(6).

While acknowledging this Court's opinion in *Segal*, the district court distinguished that case on the ground that the loss-carryback refund in *Segal* arose from rights created by Congress prior to the commencement of the debtor's bankruptcy. The district court noted that several bankruptcy court decisions had held *Segal* on point when faced with similar facts, but the district court deemed them unpersuasive. App., *infra*, 50a-51a. Instead, the district court agreed with opinions of the Eighth Circuit Bankruptcy Appellate Panel, *In re Vote*, 261 B.R. 439, 444 (B.A.P. 8th Cir. 2001), aff'd, 276 F.3d 1024 (8th Cir. 2002), and the Fifth Circuit, *In re Burgess*, 392 F.3d 782, 786 (5th Cir. 2004), aff'd, 438 F.3d 493 (5th Cir. 2006) (*en banc*). The district court held that, as of the petition date, respondent had only a mere hope that the crop losses would result in a government payment, which did not amount to a cognizable property interest under § 541(a)(6). App., *infra*, 55a. The district court held that that the property interest did not come into existence until Congress provided for relief in 2003, so that "growing crops and suffering crop loss—no matter how sufficiently rooted to the

pre-bankruptcy past—are of no legal significance and create no right." *Ibid.*

On the issue of whether the crop disaster payment came into the estate as proceeds under § 541(a)(6), the district court affirmed on substantially the same reasoning offered by the bankruptcy court. App., *infra*, 57a-61a. To the extent that its construction of the Code would yield absurd and unfair results, the district court concluded, petitioner's claim should be presented to Congress, not the courts. *Id.* at 61a-63a.

B. The Court of Appeals' Decision

Petitioner appealed to the Eleventh Circuit, which affirmed by a divided panel opinion. Relying on prior circuit precedent regarding property interests arising from a legal malpractice claim, *In re Witko*, 374 F.3d 1040, 1043-1044 (11th Cir. 2004), the court of appeals held that respondent's right to the bailout payment did not arise until the Act's enactment on February 20, 2003, approximately fifty days after respondent's decision to convert to a Chapter 7 proceeding. App., *infra*, 3a-4a, 7a. The court also deemed persuasive the opinions of the Fifth and Eighth Circuits in *Burgess* and *Vote*. In addition, the court of appeals rejected this Court's opinion in *Segal*, holding that the Bankruptcy Code superseded that case. *Id.* at 12a ("The *Segal* decision told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property.").

The Eleventh Circuit adopted the reasoning of the district court on the question whether the bailout payment came into the bankruptcy estate as proceeds under § 541(a)(6). Like the district court, the Eleventh Circuit deemed its holding on the § 541(a)(1) issue controlling on the § 541(a)(6) claim. Because it ruled that respondent had no property interest in the bailout payment as of the petition date, the bankruptcy estate "did not include an interest that could generate proceeds." App., *infra*, 18a. The court of appeals also held that the

bailout payment did not relate back to the low 2001 crop yield, and accordingly, was not "proceeds" of that crop.

Judge Pryor dissented. He would have held the crop bailout payments to be property of the estate under either § 541(a)(1) or (a)(6). App., *infra*, 22a. He concluded that the enactment of the Bankruptcy Code did not overrule *Segal*. Pointing to the consistency of the statutory text both before and after *Segal*, courts' continued reliance on *Segal*, and the Bankruptcy Code's legislative history, Judge Pryor would have held that *Segal*'s sufficiently rooted test remained in force. *Id.* at 28a. He also observed that two opinions of this Court, both of which held that payments predicated on post-petition legislation belonged to the bankruptcy estate, counseled in favor of including the payments at issue here. *Id.* at 29a-33a (discussing *Williams* v. *Heard*, 140 U.S. 529 (1891), and *Milnor* v. *Metz*, 41 U.S. (16 Pet.) 221 (1842)). Judge Pryor concluded that, as of the petition date, respondent enjoyed "a contingent property interest that ripened into a gain post-petition due to legislation enacted by Congress." *Id.* at 33a. As this contingent property interest arose wholly from respondent's pre-petition activities, and "legislation compensated him for that pre-petition loss, [respondent's] crop disaster payment was 'rooted in the prebankruptcy past,'" and came into the estate under § 541(a)(1). *Id.* at 37a (quoting *Segal*, 382 U.S. at 380).

But even if the payment were not included by operation of § 541(a)(1), Judge Pryor further explained, it constituted proceeds of estate property under § 541(a)(6). App., *infra*, 22a. After showing that the disaster payment would be "proceeds" under Georgia's Uniform Commercial Code ("UCC"), Judge Pryor demonstrated that the Bankruptcy Code's definition of proceeds, which is widely acknowledged to be broader than the UCC's definition, encompasses the bailout payment at issue here. *Id.* at 38a. The majority's reasoning, Judge Pryor argued, "leads to an absurd result." *Id.* at 42a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided As To Whether The Bankruptcy Code Of 1978 Superseded *Segal*'s "Sufficiently Rooted" Test

The prior Bankruptcy Act provided that the estate included "the title of the bankrupt as of the date of the filing of the petition * * * to all of the following kinds of property wherever located." 11 U.S.C. § 110(a) (1964). In *Segal* v. *Rochelle*, 382 U.S. 375, 380 (1966), this Court held that an interest "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start * * * should be regarded as 'property.'" Congress later passed the Bankruptcy Code of 1978, which states that property of the bankruptcy estate consists of "all legal or equitable interests of the debtor * * * as of the commencement of the case." 11 U.S.C. § 541(a)(1). The Second, Fourth, Sixth, and Ninth Circuits have held that *Segal*'s test survived the passage of the Code. The Fifth and Eleventh Circuits, conversely, have held that it did not.

1. In *Segal*, this Court held that a financial interest sufficiently rooted in the pre-bankruptcy past should be treated as property of the bankruptcy estate even if the interest did not come to complete fruition until after the bankruptcy petition was filed. 382 U.S. at 380. There, the debtors filed voluntary bankruptcy petitions, and the trustee of their bankruptcy estates later sought and obtained loss-carryback tax refunds based on the debtors' pre-petition activities. *Id.* at 376. The Internal Revenue Code, which created these refunds, expressly provided that claims for the refunds could not be made until the end of the year. *Id.* at 377-378. Accordingly, although the losses underlying the refunds occurred before the debtors filed for bankruptcy, the claim for the refunds could not be made until after they filed for bankruptcy.

The Court addressed whether the loss-carryback tax refunds were "property" when the debtors filed for bankruptcy. 382 U.S. at 376. Recognizing the impossibility of categorically defining "property," the Court held that the tax refunds were "property" for purposes of § 541(a)(1)'s predecessor provision. *Id.* at 379. The Court stated that the "main thrust of § 70a(5) [of the Bankruptcy Act] is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition." *Ibid.* Additionally, "the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *Ibid.* The counterbalancing policy for this definition, the Court explained, is that bankruptcy also seeks "to leave the bankrupt free after the date of his petition to accumulate new wealth in the future." *Ibid.*

The Court held that the loss-carryback refund claim was "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as 'property' under § 70a(5)." 382 U.S. at 380. It rejected the debtors' argument that they could not have claimed the refund until the end of the year because "postponed enjoyment does not disqualify an interest as 'property.'" *Ibid.* Moreover, the Court observed that "two key elements point[ed] toward realization of a refund at the time the bankruptcy petitions were filed: taxes had been paid on net income within the past three years, and the year of bankruptcy at that point exhibited a net operating loss." *Ibid.* Those facts made the claim "sufficiently rooted in the pre-bankruptcy past," and the refunds therefore were included in the bankruptcy estates.

Segal thus rejected a formalistic approach to defining property for purposes of bankruptcy. Instead of relying on arbitrary legal deadlines, the Court adopted a flexible, fact-driven analysis. The Court, moreover, instructed that the

Bankruptcy Act's "own purposes must ultimately govern" "[w]hether an item is classed as 'property.'" 382 U.S. at 379.

2. The Second, Fourth, Sixth, and Ninth Circuits have held that *Segal*'s sufficiently rooted test survived the passage of the Bankruptcy Code. See, *e.g.*, *United States* v. *Kennedy*, 2000 WL 1720962, at *4 (2d Cir. 2000) (unpublished) ("[T]he compensation defendant received under the non-competition agreement was 'rooted in the pre-bankruptcy past.'"); *In re Shearin*, 224 F.3d 346, 351 (4th Cir. 2000) (affirming application of *Segal*'s sufficiently rooted test); *In re Williams Bros. Asphalt Paving Co.*, 1995 WL 316799, at *1 (6th Cir. 1995) (unpublished) (same); *In re Ryerson*, 739 F.2d 1423, 1426 (9th Cir. 1984).

In *Ryerson*, for example, the Ninth Circuit held that payments for services performed prior to bankruptcy were includable in the bankruptcy estate because they were sufficiently rooted in the pre-bankruptcy past. 739 F.2d at 1426. The court explained that "[a]mong the debtor's legal interests that become a part of the bankruptcy estate under the Code are his choses in action and claims against third parties as of the commencement of the case." *Id.* at 1425. Indeed, the Ninth Circuit broadened *Segal*'s sufficiently rooted test in favor of creditors by explaining that "[t]he Code follows *Segal* * * * but eliminates the requirement that [post-petition property] not be entangled with the debtor's ability to make a fresh start." *Id.* at 1426.

Several circuits that have not specifically employed the sufficiently rooted test have nonetheless cited *Segal* and have relied on its broad construction of property without any suggestion that the Code somehow supplanted the sufficiently rooted test. See, *e.g.*, *In re Watman*, 458 F.3d 26, 33 (1st Cir. 2006) (noting that *Segal* instructs that property "should be interpreted 'most generously'") (quoting *Glosband* v. *Watts Detective Agency*, 21 B.R. 963, 971 (D. Mass. 1981) (quoting *Segal*, 382 U.S. at 379)); *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 211 (3d Cir. 2006) (quoting *Segal*); *Watson* v. *H.J.*

Heinz Co., 101 Fed. App'x 823, 825 (Fed. Cir. 2004) (same); *In re Yonikus*, 996 F.2d 866, 869 & n.3 (7th Cir. 1993) (same); *In re Barowsky*, 946 F.2d 1516, 1518 (10th Cir. 1991) ("When Congress enacted section 541 of the Bankruptcy Act of 1978, it affirmatively adopted the Supreme Court's analysis of property that was contained in *Segal*.") (footnote omitted). Moreover, even without explicitly relying on the sufficiently rooted test, some courts continue to use the flexible approach that underlies *Segal*. See, *e.g.*, *In re Schneider*, 864 F.2d 683, 685 (10th Cir. 1988) ("In deciding what constitutes property under § 541, we are mindful of the trustee's interest in reaching all assets of the debtor contrasted with the debtor's interest in accumulating wealth post-petition.") (citing *Segal*, 382 U.S. at 379).

3. The Fifth and Eleventh Circuits have reached the exact opposite conclusion, holding that the passage of the Bankruptcy Code overruled *Segal*'s sufficiently rooted test. See App., *infra*, 12a ("'*Segal*'s 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code.'") (quoting *In re Burgess*, 438 F.3d 493, 498 (5th Cir. 2006) (*en banc*)); *Burgess*, 438 F.3d at 498 (same). In the decision below, the Eleventh Circuit rejected *Segal* wholesale. It stated that, when Congress "overhauled the Bankruptcy Code in 1978," it intended § 541(a)(1) to restrict "property of the estate to that which existed 'as of the commencement of the case.'" App., *infra*, 12a (citation omitted). Accordingly, it asserted that "*Segal* * * * told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property." *Ibid.*

The Fifth Circuit's *en banc* decision in *Burgess*, while conceding that Congress "specifically approved of *Segal*'s result," nonetheless rejected the sufficiently rooted test outright. 438 F.3d at 498. It argued that "'[t]he enactment of the Bankruptcy Code undertook to obviate th[e] analytical conundrum'" of the sufficiently rooted test. *Id.* at 499 (quoting *In re Goff*, 706 F.2d 574, 578 (5th Cir. 1983), over-

ruled on other grounds by *Patterson* v. *Shumate*, 504 U.S. 753 (1992)) (emphasis omitted). Consequently, the court refused to apply the fact-driven approach of *Segal* and determined that crop bailout payments were not property of the estate.[3]

In sum, in the Second, Fourth, Sixth, and Ninth Circuits, *Segal*'s sufficiently rooted test remains in force. The Fifth and Eleventh Circuits, and perhaps also the Eighth,[4] no longer follow *Segal*'s approach. This question has divided the courts of appeals, and this Court's intervention is necessary to resolve this conflict.

II. The Eleventh Circuit's Rejection Of *Segal* Conflicts With This Court's Decisions And The Text And History Of The Bankruptcy Code

1. This Court has never held or suggested that the Bankruptcy Code superseded any part of *Segal*. Indeed, in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court suggested the contrary. In that case, the Second Circuit (per Judge Friendly) had rejected a "rigid" reading of

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[3] Chief Judge Jones (joined by six other judges) dissented, arguing that "[t]here is little or no support for [the majority's] conclusion" that *Segal* was superseded by the Bankruptcy Code. *Burgess*, 438 F.3d at 512 (Jones, C.J., dissenting). She explained that the case would be "straightforward under [*United States* v. *Whiting Pools*[, *Inc.*, 462 U.S. 198 (1983)], *Segal* and *Williams* [v. *Heard*, 140 U.S. 529 (1891),]" because at the time of the debtor's crop loss "there was 'an expectancy of interest,' 'a possibility coupled with an interest,' that the crop loss could be compensable in the future [and] [t]hat potential * * * is a property right * * * sufficiently rooted in the prebankruptcy past as to become property of the bankruptcy estate." *Burgess*, 438 F.3d at 512.

[4] The Eighth Circuit would appear to agree (at least in part) with the Fifth and the Eleventh Circuits' rejection of *Segal*. In *In re Vote*, 276 F.3d 1024 (8th Cir. 2002), the court limited *Segal* to tax refunds and held that the sufficiently rooted test does not apply when crop bailout legislation is passed after a debtor files for bankruptcy. It argued that reliance on the sufficiently rooted test would violate the Code's intention not "'to expend [*sic*] the debtor's rights against others more than they exist at the commencement of the case.'" *Id.* at 1026 (quoting S. Rep. No. 95-989, at 82 (1978)).

§ 541(a)(1) and explained that that section was intended to "preserve or enlarge" the definition of "property of the estate" under the old Act. See *United States* v. *Whiting Pools, Inc.*, 674 F.2d 144, 150 n.10 (2d Cir. 1982). In affirming, this Court adopted Judge Friendly's reasoning and explained that, while "'as of the commencement of the case' * * * could be read to limit the estate to those 'interests of the debtor in property' at the time of the filing of the petition," it instead is "a definition of what is included in the estate, rather than as a limitation." *Whiting Pools*, 462 U.S. at 203. That is, § 541 does not impose a strict temporal limitation, but instead provides only a starting point for the definition of "property." Although not addressing *Segal* directly, this Court thus affirmed that a similarly flexible and expansive definition should apply to § 541(a)(1).

Moreover, the fact-driven test of *Segal* and *Whiting Pools* accords with this Court's long-established precedent. See *Williams* v. *Heard*, 140 U.S. 529 (1891); *Milnor* v. *Metz*, 41 U.S. (16 Pet.) 221 (1842). As Judge Pryor explained in dissent below: "These precedents establish that property rights are 'created by reason of losses having been suffered,' * * * not by later legislation that provides compensation for those losses." App., *infra*, 29a-30a (quoting *Williams*, 140 U.S. at 541).

In *Williams*, a debtor who had insured ships during the Civil War filed for bankruptcy; five years after his discharge in bankruptcy, Congress passed legislation that compensated him for losses incurred during the Civil War and before he filed for bankruptcy. 140 U.S. at 530. This Court ruled that those payments were part of the bankruptcy estate because "[t]here was * * * at all times a possibility that the government would" decide to compensate him for his losses. *Id.* at 541. The Court added that the payments "were rights growing out of property, rights, it is true, that were not enforceable until after the passage of the [legislation]. But the act of congress did not create the rights. They had existed

at all times since the losses occurred." *Ibid.* Similarly, in *Milnor*, this Court included compensation for overtime services that the debtor performed pre-petition in the bankruptcy estate, even though Congress passed the legislation giving rise to the compensation post-petition. 41 U.S. at 225-227. The Court's reasoning in *Williams* and *Milnor* supports *Segal* and directly contradicts the Eleventh Circuit's decision.

2. The text and legislative history of the 1978 Bankruptcy Code demonstrate that it did not intend to overturn or weaken *Segal*. "The normal rule of statutory interpretation is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986); see also *United States* v. *Noland*, 517 U.S. 535, 539 (1996) (same). Accordingly, one would expect Congress to have spoken clearly if its purpose was to reject *Segal*. Quite the opposite is the case.

The Bankruptcy Code only insignificantly modified the statutory text defining property. The old Act encompassed "as of the date of the filing of the petition * * * all of the following kinds of property wherever located." 11 U.S.C. § 110(a) (1964). The new Code used similar temporal language: "of all the following property, wherever located and by whomever held: * * * all legal or equitable interests of the debtor * * * as of the commencement of the case." *Id.* § 541(a)(1). "When Congress amends the bankruptcy laws, it does not write 'on a clean slate,'" *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992), and it is difficult to see how Congress could have intended the minor changes in the text of the 1978 Code to effect the significant shift in the definition of property that would result from the rejection of *Segal*'s sufficiently rooted test.

Moreover, "this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Dewsnup*, 502 U.S. at 419. Far from suggesting that Congress wished to undermine *Segal*, the legislative history confirms the contrary. Congress intended the Code to define the bankruptcy estate expansively: "[T]he estate is comprised of all legal or equitable interest of the debtor * * * as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property * * * and all other forms of property currently specified in section 70a of the Bankruptcy Act." S. Rep. No. 95-989, at 82 (1978); H.R. Rep. No. 95-595, at 367 (1977). Most importantly, the Code's drafters specifically stated that "[t]he result of [*Segal*] is followed." S. Rep. No. 95-989, at 82; H.R. Rep. No. 95-595, at 367. Indeed, Congress's express affirmation of *Segal* stands in stark contrast to its overruling of two other decisions of this Court through § 541. S. Rep. No. 95-989, at 82; H.R. Rep. No. 95-595, at 368. ("[Section 541(a)(1)] has the effect of overruling *Lockwood* v. *Exchange Bank*, 190 U.S. 294 (1903)," and "*Lines* v. *Frederick*, 400 U.S. 18 (1970)."). There thus can be little doubt that Congress did not purport to displace *Segal* by enacting the Code, and nothing suggests that the Code otherwise intended to discard the sufficiently rooted test.

III. The Eleventh Circuit's Holding That Crop Disaster Payments Are Not "Proceeds * * * Of Or From Property Of The Estate" Under 11 U.S.C. § 541(a)(6) Conflicts With Lower Court Opinions

The Eleventh Circuit's decision contradicts the conclusions of several sister circuits in finding that crop disaster payments are not "[p]roceeds * * * of or from property of the estate" under § 541(a)(6). As established in § 541(a), "property of the estate" includes any property that meets the requirements of *any* of the subsections (a)(1)

through (a)(7). While § 541(a)(1) discusses one category of "property of the estate"—"legal or equitable" property interests of the debtor "as of the commencement of the case"—§ 541(a)(6) expands upon the term to include "[p]roceeds * * * of or from property of the estate." In short, § 541(a)(6)'s proceeds provision provides an alternate basis for finding that a given item is "property of the estate" under the Bankruptcy Code.

A. The Eleventh Circuit's Decision That Crop Bailout Payments Are "Assistance" Rather Than "Proceeds" Conflicts With Other Courts' Determinations That Bailout Payments Are "Proceeds Of That Crop"

Contradicting several of its sister circuits, the Eleventh Circuit below concluded that crop bailout payments do not constitute "proceeds" under § 541(a)(6) because they are not given in exchange for the ruined crop. Specifically, the Eleventh Circuit stated that it did not accept the notion that "the payments are proceeds because they relate back to a pre-petition crop." App., *infra*, 18a. The court held that any compensation that the debtor received directly from disposition of the pre-petition crops would be "proceeds of property of the estate," but stated that "Congress did not purport to purchase the ruined crops of farmers like Bracewell. Instead, Congress provided *assistance* to farmers like him because of losses they had suffered in the past." *Ibid.* The court therefore equated the crop bailout payments to a mere gift or handout from the government rather than a payment in *compensation* for the farmer's loss. Since the bailout payments did not act as compensation for the failed crops, the court reasoned, they could not be proceeds of property of the estate. *Ibid.* ("Because this assistance was not given in exchange for property of the estate, it is not proceeds of property of the estate.").

The Eleventh Circuit's holding conflicts with decisions of the Seventh, Ninth, and Tenth Circuits, which all would hold

that crop bailout payments are "proceeds" of the failed crop, rather than mere gifts from the government. The Tenth Circuit identified a well-established distinction, ignored by the court below, between crop bailout payments and "payments-in-kind" ("PIK") (payments, sometimes in the form of actual crops, given to farmers by the government in return for *not* planting a crop and performing certain other obligations). *In re Schneider*, 864 F.2d 683, 684-686 (10th Cir. 1988); see *infra* note 6. While crop bailout payments are proceeds of the failed crop, PIK arise from contractual rights. *Schneider*, 864 F.2d at 685. The *Schneider* court held that PIK arising from a contract between the debtor and the government were not necessarily "proceeds" of a crop under § 541(a)(6), because the payments arise from accounts or intangibles. *Ibid.*[5] Conversely, the court stated that "[a]gricultural entitlement payments which result from the actual disposition of a planted crop are proceeds of that crop." *Ibid.*[6]

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[5] The regulations governing the PIK program required "an executed contract [as] a prerequisite to participation," *Schneider*, 864 F.2d at 686, and the PIK contract required the debtor to provide certain services (including limiting the amount of wheat planted, using good soil conservation techniques, and controlling erosion) in exchange for payment. *Id.* at 685-686.

[6] Cases cited by *Schneider* make clear that crop bailout payments, such as the one here, are included in the *Schneider* court's definition of "entitlement payments which result from the actual disposition of a planted crop." See, *e.g.*, *In re Schmaling*, 783 F.2d 680, 683 (7th Cir. 1986) (contrasting PIK payments with "proceeds of an existing, failed crop"); *In re Munger*, 495 F.2d 511, 513 (9th Cir. 1974) (abandonment payments are "proceeds" of the abandoned crop); *In re Kruger*, 78 B.R. 538, 541 (Bankr. C.D. Ill. 1987) ("there was a disposition through the abandonment [of the crop], and the subsidy was paid as a result of the abandonment"). Other cases confirm that crop bailout payments result from the disposition of a planted crop. *Burgess*, 438 F.3d at 516 (Jones, C.J., dissenting) (reading *Schneider* to state that "agricultural entitlement payments arising from lost crops 'are proceeds of that crop' under § 541(a)(6)"); *In re White*, 1989 WL 146417, at *5 (Bankr. N.D. Iowa 1989) (unpublished) ("A 'disposition' of the crop occurred

The Seventh Circuit addressed a very similar issue in *In re Schmaling*, 783 F.2d 680 (7th Cir. 1986). *Schmaling* involved a contract dispute between a creditor bank and the debtor, after the debtor had signed a security agreement with the bank. *Id.* at 681. Under the Uniform Commercial Code ("UCC"), a security interest includes "proceeds" of collateral. *Id.* at 682 n.2. The court noted that a PIK could not be considered "proceeds of anything" under the UCC because there was never any crop grown to begin with. *Id.* at 683. The court contrasted PIK with payments that were "proceeds of an existing, failed crop," implying that payments resulting from a failed crop, such as the ones at issue in this case would be considered "proceeds" of that crop under the UCC. *Ibid.* ("The right to the PIK entitlement was a general intangible, not proceeds of an existing, failed crop—or proceeds of anything.").[7]

The Ninth Circuit addressed the "proceeds" issue in the context of federal abandonment payments in *In re Munger*, 495 F.2d 511 (9th Cir. 1974). In *Munger*, the debtor began growing a sugar beet crop, only to apply for abandonment payments, which the federal government gave to farmers who agreed to abandon certain crops. The issue in that case was whether the subsequent abandonment payments were

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when part of the Debtor's unmatured crops were damaged or destroyed by weather conditions. * * * The Debtor's entitlements under the Act were received in connection with that disposition.").

[7] Although *Schmaling* involves the UCC rather than § 541(a)(6), this distinction, if anything, only strengthens the argument that crop disaster payments should be considered "proceeds" under § 541(a)(6). Several courts have noted that the definition of "proceeds" under the UCC is narrower than that used in § 541(a)(6). See, *e.g.*, *Am. Bankers Ins. Co.* v. *Maness*, 101 F.3d 358, 363 (4th Cir. 1996); *In re Farmpro Servs., Inc.*, 276 B.R. 620, 626 (D.N.D. 2002); *In re Ring*, 169 B.R. 73, 76 (Bankr. M.D. Ga. 1993), aff'd, 160 B.R. 692 (M.D. Ga. 1993); *White*, 1989 WL 146417, at *3. Therefore, if crop disaster payments are "proceeds" under the UCC, they must also be considered "proceeds" under the broader definition of § 541(a)(6).

"proceeds" of the abandoned crop within the meaning of the California version of the UCC. The court held that abandonment payments "are within a broad reading of 'proceeds,'" *id.* at 513, and that "[n]ot to include such payments within the term 'proceeds' would be to raise distinctions of form over the realities underlying this financing transaction, a result contrary to the intent of the Uniform Commercial Code." *Ibid.*

Several district and bankruptcy courts, adopting the approach of the Seventh, Ninth, and Tenth Circuits, have specifically held that crop bailout payments are "proceeds" under § 541(a)(6). See, *e.g.*, *In re Farmpro Servs., Inc.*, 276 B.R. 620, 624 (D.N.D. 2002); *In re Lemos*, 243 B.R. 96, 101 (Bankr. D. Idaho 1999); *In re Ring*, 169 B.R. 73, 77 (Bankr. M.D. Ga. 1993), aff'd, 160 B.R. 692 (M.D. Ga. 1993) ("The purpose of the disaster payments is to compensate the Debtor for crop losses. Since the [failed] crops and their proceeds are property of the estate and the disaster payments are merely the substitute for the proceeds of the crops, then it logically follows that the disaster payments are also property of the estate."); *In re White*, 1989 WL 146417, at *4 (Bankr. N.D. Iowa 1989) (unpublished) ("'*Subsidy payments actually take the place of crops that have been planted but fail, and accordingly, are considered to be proceeds of growing crops.*'") (quoting *In re Mattick*, 45 B.R. 615, 617 (Bankr. D. Minn. 1985)). Moreover, the courts in *Ring* and *White* specifically cited *Schmaling* in support of their holdings that crop disaster payments are "proceeds." See *Ring*, 169 B.R. at 75; *White*, 1989 WL 146417 at *5. The *Ring* court also cited *Schnieder* to support its holding. *Ring*, 169 B.R. at 75.

The approach articulated by the Seventh, Ninth, and Tenth Circuits also conforms with the generally understood meaning of "proceeds." Proceeds are "what is produced by or derived from something * * * by way of total revenue: the total amount brought in." *Webster's Third New International Dictionary* 1807 (Philip Babcock Gove, ed., 1993); see also

Black's Law Dictionary 1242 (Bryan A. Garner, ed., 8th ed. 2004) (defining proceeds as "[t]he value of land, goods, or investments when converted into money"). Thus, "proceeds" exist when there is an established nexus to a specific item or property interest that produced the proceeds.

The Seventh, Ninth, and Tenth Circuit precedents support this definition. On the one hand, PIK are not proceeds, because they are payments not to grow a crop; there is no specific link to any particular interest or property beyond the contract obligation itself. On the other hand, as the Ninth Circuit held in *Munger*, abandonment payments are proceeds of a particular crop when that crop is destroyed in order to receive the payments. Similarly, crop bailout payments such as the one at issue here are "proceeds" of the failed crop because there is a direct link between the payment and the specific, failed crop. If the respondent here had never planted the crop, he would not have had a right to the payout, so the payout resulted from the existence of the crop itself.

Finally, Congress intended for the term "proceeds" in § 541(a)(6) to have a very broad meaning, extending even beyond the ordinary definitions of the word. See *In re Rossmiller*, 1996 WL 175369, at *2 (10th Cir. 1996) (unpublished); *In re Hanley*, 305 B.R. 84, 86-87 (Bankr. M.D. Fla. 2003). As used in the statute, the term "proceeds" encompasses "all proceeds of property of the estate," *Rosmiller*, 1996 WL 175369, at *2, or "any conversion in the form of property of the estate." *Hanley*, 305 B.R. at 87. Since the crop bailout payments at issue here comport with the dictionary definition of proceeds, they qualify as "proceeds" under the extremely broad language of § 541(a)(6).

In concluding that crop bailout payments were merely "assistance" payments that were "not given in exchange for property of the estate," App., *infra*, 18a, the Eleventh Circuit ignored the greater weight of authority, which established that such payments are indeed "proceeds" of the failed crop under § 541(a)(6) or comparable provisions of the UCC. This

Court's intervention is necessary to resolve the conflict and correct the Eleventh Circuit's error.

B. The Eleventh Circuit Erroneously Concluded That The Term "Property Of The Estate" In § 541(a)(6) Meant Property Fulfilling The Requirements Of § 541(a)(1)

The Eleventh Circuit made the further erroneous assertion that the failed crops themselves are not "property of the estate" under § 541(a)(6). In reaching this conclusion, the court of appeals appears to have wrongly equated the term "property of the estate" in § 541(a)(6) with the language in § 541(a)(1), which lists only one narrow category of items that are considered "property of the estate" under the Bankruptcy Code. The court wrote, "'[i]f [respondent] had no right or interest that constituted property within the meaning of § 541(a)(1) at the commencement of the case, then the payment he later received cannot be proceeds of property of the estate under § 541(a)(6).'" App., *infra*, 19a (quoting *Burgess*, 438 F.3d at 499). That is wrong. See *supra* pp. 17-18 (explaining that subsections (a)(1) through (a)(7) define different subspecies of "property of the estate" under § 541(a)).

The Eleventh Circuit's assertion conflicts with the Tenth Circuit's opinion in *Schneider*. By asserting that crop bailout payments are "proceeds of that [failed] crop" under § 541(a)(6), the *Schneider* court implicitly recognized that the failed crop must be considered "property of the estate" under the statute. Otherwise, the court's statement that the bailout payments are "proceeds" would be irrelevant. Similarly, the district and bankruptcy courts following the *Schneider* rule have uniformly concluded that crop bailout payments that are "proceeds" of the failed crops are also "proceeds * * * of or from property of the estate" under § 541(a)(6). See, *e.g.*, *Farmpro Servs.*, 276 B.R. at 624; *Lemos*, 243 B.R. at 101; *Ring*, 169 B.R. at 77; *White*, 1989 WL 146417, at *4. For those courts, the logical step required to reach this

conclusion—finding that the failed crops were "property of the estate" under § 541(a)(6)—seemed so elementary as to deserve little or no discussion. The court in *Ring*, for example, simply concluded, "since the crops and their proceeds are property of the estate and the disaster payments are merely the substitute for the proceeds of the crops, then it logically follows that the disaster payments are also property of the estate." *Ring*, 169 B.R. at 77. The court in *White* also concluded with little comment that the crop bailout payments "qualify as crop 'proceeds' under * * * 541(a)(6)" and that "such 'proceeds' are included in the bankruptcy estate under * * * section[] 541," leaving unstated the conclusion that the crops therefore must logically be considered "property of the estate," as defined in § 541(a)(6). *White*, 1989 WL 146417, at *6.

The conclusion implicit in *Schneider*, and in the various district and bankruptcy court cases following *Schneider*'s rule, is that "property of the estate" in § 541(a)(6) must be interpreted broadly to include either a contingent interest in future crop bailout payments (see *supra* p. 11), or to include property (the failed crops) that existed at a point *before* the debtor filed for bankruptcy, but perhaps did not exist *at the exact moment the debtor filed for bankruptcy*. This conclusion conflicts with the Eleventh Circuit's statement that, in order for § 541(a)(6) to apply, debtors must first satisfy § 541(a)(1) by having an "interest in property *at the commencement of the bankruptcy case* that could mature into the crop disaster payment." App., *infra*, 19a (emphasis added).

A more accurate reading of § 541(a)(6) defines "proceeds * * * of or from property of the estate" as proceeds from property owned by the debtor at or before the time that the debtor filed for bankruptcy. As explained above (*supra* pp. 23-24), that definition is consistent with the *Schneider* opinion and with holdings from several district and bankruptcy courts. That interpretation of § 541(a)(6) also

makes perfect sense, treating proceeds of property of the estate in a consistent manner, regardless of when the event occurred that ultimately resulted in the proceeds.

Respondent's crops were his property at the time they were planted and growing. During the ensuing drought, the crops in question presumably were destroyed, so this "property" did not physically exist at the time respondent filed for bankruptcy. Under the proper interpretation of § 541(a)(6), respondent's failed crops are "property of the estate," because they belonged to respondent before he filed for bankruptcy. As a result, if the crop bailout payments at issue are proceeds of the failed crop, they are also "[p]roceeds * * * of or from property of the estate" under § 541(a)(6), and therefore they belong to respondent's estate.

IV. The Decision Below Contravenes The Fundamental Objectives Of The Bankruptcy Code

The Eleventh Circuit's rule is contrary to the purposes of the Bankruptcy Code. This Court has often relied upon "the substantive effect, design, object, or policy of the statute as a whole" to interpret the terms of the Bankruptcy Code. 3B Norman J. Singer, *Statutes and Statutory Construction* § 77A:7 (6th ed. rev. 2003); see, *e.g.*, *Union Bank* v. *Wolas*, 502 U.S. 151, 161 (1991); *Whiting Pools*, 462 U.S. at 204; *Butner* v. *United States*, 440 U.S. 48, 55 (1979); *Segal*, 382 U.S. at 379. Among the purposes of the Bankruptcy Code are (1) to protect the security interests of creditors; (2) to prevent a race to the courthouse; (3) to prevent a party from receiving an undeserved windfall "'merely by reason of the happenstance of bankruptcy'"; and (4) to prevent debtor fraud. See App., *infra*, 24a, 37a (Pryor, J. dissenting) (quoting *Butner*, 440 U.S. at 55). The decision below directly contradicts each of those important fundamental goals of the Code, and this Court should grant review in order to correct this error.

1. The Fifth and Eleventh Circuits' rejection of *Segal*'s sufficiently rooted test fails adequately to protect the security interests of creditors by denying them access to funds based on the arbitrary date of filing by the debtor. That result, rather than preserving creditors' security interests, impairs the creditors' valid security interest in crops damaged by natural disasters. App., *infra*, 24a (Pryor, J., dissenting). Although the interests of creditors are always "impair[ed]" any time a rule excludes property from the estate, that result is especially suspect where, as here, the creditors' interest was the very basis for the very crops that later yielded the bailout payment. *Ibid.*; see also *id.* at 72a. By ignoring the creditors' interests, the Fifth and Eleventh Circuits violated a foundational policy of the Code.

2. The Eleventh Circuit's rule also would encourage farmers to "race to the courthouse," in violation of another fundamental goal of the Bankruptcy Code. App., *infra*, 24a (Pryor, J., dissenting); see *Wolas*, 502 U.S. at 161. As Judge Pryor argued below, instead of discouraging a creditors' race to the courthouse, the Eleventh Circuit panel's decision "*encourages* debtors who are farmers to race to the courthouse." App., *infra*, 24a (Pryor, J., dissenting) (emphasis added). Under the Eleventh Circuit's rule, farmers would be encouraged to race to file or to convert cases under Chapter 7 before crop bailout bills are enacted by Congress. *Ibid.* Thus, a rejection of *Segal*'s "sufficiently rooted" test will encourage farmers to enter their own "race of diligence" to deprive creditors of their valid property interests in crop bailout payments. *Wolas*, 502 U.S. at 161 (internal quotations omitted).

That result is not merely speculative. Congress has provided relief every year between 1988 and 1994, and again in 1998, 1999, 2000, and 2001, in the form of crop bailouts for crops lost to natural disasters or weather conditions. Bruce L. Gardner, *American Agriculture in the Twentieth Century: How It Flourished and What It Cost* 229 (2002); E.C. Pasour,

Jr. & Randal R. Rucker, *Plowshares and Pork Barrels: The Political Economy of Agriculture* 232 (2005). A farmer with failed crops would thus have every reason to believe that Congress would provide relief at some later date for severe weather-related losses he incurred. If he files bankruptcy before such relief is formally enacted, he will avoid having to pay his creditors with the profits received from the crop bailout program. It is in his best interest, then, to avoid the cooperation between debtors and creditors envisioned by the Code and to instead file for bankruptcy before any bailout payments are officially granted.

Nor would the race to the courthouse induced by the Eleventh Circuit's rejection of *Segal*'s sufficiently rooted test be limited to situations involving bankrupt farmers. *Segal* requires a flexible, fact-driven analysis to determine what is property of the estate, and thus sets no rigid legal deadline to serve as a basis for a race to the courthouse. See *Segal*, 382 U.S. at 380. However, a rejection of the *Segal* rule could open the floodgates in other situations where payments or interests that are tied clearly to the pre-bankruptcy estate would be excluded if only the bankrupt files before some enabling legislation is passed or other legal formality occurs.[8]

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[8] For example, the Internal Revenue Service's recent decision to refund telephone toll excise taxes provides the opportunity for a debtor otherwise contemplating bankruptcy to time the filing of bankruptcy to ensure that the refund inures to its own benefit. For more than a century, the IRS collected a 3% excise tax on toll telephone calls under the purported authority of 26 U.S.C. § 4251(a)(1). In recent years, numerous taxpayers filed suit seeking refunds of the excise tax on the argument that the IRS had misconstrued its authority to collect the tax. Every circuit court to decide the issue agreed with the taxpayer and ordered a refund. See *Reese Bros., Inc.* v. *United States*, 447 F.3d 229 (3d Cir. 2006); *Fortis, Inc.* v. *United States*, 447 F.3d 190 (2d Cir. 2006); *Nat'l R.R. Passenger Corp.* v. *United States*, 431 F.3d 374 (D.C. Cir. 2005); *OfficeMax, Inc.* v. *United States*, 428 F.3d 583 (6th Cir. 2005); *Am. Bankers Ins. Group* v. *United States*, 408 F.3d 1328 (11th Cir. 2005); see also *Honeywell Int'l, Inc.* v. *United States*, 64 Fed. Cl. 188 (2005). In June 2006, the IRS acquiesced to these rulings

Thus, the decision below could have the same harmful effect in numerous other areas.

3. The lower court's ruling would allow a farmer to receive an undeserved windfall, in violation of yet another fundamental purpose of the Code. See *Butner*, 440 U.S. at 55 (quoting *Lewis* v. *Manufacturers Nat'l Bank of Detroit*, 364 U.S. 603, 609 (1961)). That is, where two debtors are similarly situated, and the only thing distinguishing them is the date of filing of bankruptcy, they should not receive different treatment in a way that would grant one an unfair benefit based only on an arbitrary distinction. See App., *infra*, 37a (Pryor, J, dissenting) (maintaining that where a debtor is allowed "selectively to exclude property from the debtor estate by choosing the most advantageous date to file for bankruptcy" he receives "a windfall * * * at the expense of creditors").

Thus, two debtors filing bankruptcy the day before and the day after a crop bailout plan is formally passed by Congress will receive different treatment under the Eleventh Circuit's' rule: the earlier-filing farmer will receive a windfall where he is able to keep the money from the bailout payments, while the later-filing farmer will have to include the payments as property of his estate. The first farmer would be allowed to "selectively * * * exclude" the same crop bailout payment from his estate that will rightfully become a part of the estate of the second debtor. App., *infra*, 37a. A farmer who took advantage of this loophole would reap the unearned windfall even if the farmer had gained knowledge of the crop bailout payment, whether legally or illicitly, and

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and agreed to refund three years worth of excise taxes paid. See I.R.S. Notice 2006-50, 2006-25 I.R.B. 1141 (June 19, 2006). A strategic debtor who filed for bankruptcy protection in anticipation of acquiescence by the IRS could withhold the entire excise tax refund from the estate because the IRS formally authorized the refund post-petition, even though the regulation provides for a refund of taxes paid entirely prior to the commencement of bankruptcy.

even if he in fact encouraged the passage of the legislation. A farmer privy to such information would have a "head start" in the race to the courthouse encouraged under the rule espoused below. *Wolas*, 502 U.S. at 162. "[T]he decision of the majorit[ies]" in the Fifth and Eleventh Circuits therefore "grants debtors who are farmers a windfall" in violation of the purposes of the Bankruptcy Code. App., *infra*, 37a.

4. The holding of the court of appeals below also conflicts with the fundamental purpose of the Bankruptcy Code to prevent debtor abuse. App., *infra*, 37a (Pryor, J., dissenting). The Code has many provisions that deny the debtor the right to select what property will and will not be part of the estate. See *id.* at 37a (citing Bankruptcy Code provisions). Under the decision below, whether a creditor receives payments associated with failed crops rests entirely with the debtor, who can "choos[e] the most advantageous date to file for bankruptcy"—even with one who knows and intends to file bankruptcy for the express purpose of denying his creditors access to funds that would otherwise be rightfully theirs. *Ibid.* Thus even a debtor with intent to defraud will be allowed to reap the windfall and deprive his creditors of their due based on the lower court's ruling.

5. The effects of the lower court's failure to respect these fundamental purposes of the Bankruptcy Code could be far-reaching. The Bankruptcy Code provides creditors certain rights, "'including the right to adequate protection,'" which "'replace the protection afforded by possession.'" App., *infra*, 42a (Pryor, J., dissenting) (quoting *Whiting Pools*, 462 U.S. at 207). Where a rule such as that adopted below gives a farmer the right to "selectively * * * exclude property from the debtor estate," a creditor may be wary when asked to loan money to farmers in the future, since he can no longer rely on the Bankruptcy Code to adequately protect his security interest. *Ibid.* The result will be that creditors either decline to lend money to farmers under certain circumstances, or lend money at higher rates to protect against the risk of future loss.

See Thomas E. Plank, *The Outer Boundaries of the Bankruptcy Estate*, 47 Emory L.J. 1193, 1287 n.15 (1998) (stating that increases in costs of credit as a result of excluding certain property from property of the estate will be passed on to borrowers). Although this will not necessarily adversely affect the farmer whose initial actions led to the change in credit availability or rates, other farmers will bear the costs that will result from his actions. Furthermore, those adverse effects would not be limited to situations where the debtor was a farmer; indeed, the rejection of *Segal*'s sufficiently rooted rule could threaten borrowers' access to funds in any number of circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-11951

D. C. Docket No. 04-00033-CV-HL-6
BKCY No. 02-60546-BKC-JTL

In Re:

RICKY WAYNE BRACEWELL,

Debtor.

RICKY WAYNE BRACEWELL,

Plaintiff-Appellee,

versus

WALTER W. KELLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(June 30, 2006)

Before CARNES, HULL and PRYOR, Circuit Judges.

CARNES, Circuit Judge:

This is an appeal by the trustee of the bankruptcy estate of Ricky Bracewell from an order of the district court excluding from the estate a payment Bracewell received under the Agricultural Assistance Act of 2003 for crop losses he had sustained. The appeal turns on the issue of whether a crop disaster payment is property of the debtor's estate under 11 U.S.C. § 541(a)(1) or (a)(6) if the losses occurred before the bankruptcy filing or conversion date but the legislation authorizing the payment came afterwards. The bankruptcy court ruled that the payments were property of the estate under § 541(a)(1) but not under (a)(6). On Bracewell's appeal, the district court ruled that the payment was not property of the bankruptcy estate under either subsection of § 541. This is the trustee's appeal from that ruling.

I.

The facts have been stipulated throughout these proceedings. Ricky Bracewell planted approximately 223 acres of seed wheat in November 2000 and approximately 374 acres of seed cotton in May 2001. A drought in 2001 substantially reduced Bracewell's crop yields. As a result, he was unable to repay the debts he had incurred to produce the crops. Bracewell filed a Chapter 12 bankruptcy petition on May 29, 2002, and he converted it to a Chapter 7 case on January 2, 2003.

In July 2002, while Bracewell's bankruptcy petition was pending, the Emergency Farmer and Rancher Assistance Act of 2002 was introduced in the House of Representatives. H.R. 5310, 107th Cong. (2002). That proposed legislation was not enacted. In January 2003, after Bracewell had converted his bankruptcy case to chapter 7, Congress reconvened and the legislation was reintroduced as The

Agricultural Assistance Act of 2003. H.R.J. Res. 2, 108th Cong. (2003). The Act was signed into law on February 20, 2003. Agricultural Assistance Act of 2003, Pub. L. No. 108-7, div. N, tit. II, 117 Stat. 538 (2003). It provided for monetary assistance to farmers who had suffered losses to their 2001 or 2002 crops due to weather-related disasters or emergency conditions. *Id.* § 202(a), 117 Stat. at 538. Under the Act farmers who had suffered losses to both their 2001 and 2002 crops could receive assistance for only one year's loss, the year to be selected by each farmer. *Id.* § 202(c), 117 Stat. at 538. On January 30, 2004, Bracewell applied to the Department of Agriculture's Farm Service Agency for a payment as a result of the losses he had suffered to his 2001 wheat and cotton crops. He received that payment, in the amount of $41,566, on February 19, 2004, while his Chapter 7 case was still pending in the bankruptcy court.

II.

A.

We begin our legal discussion by taking up the question of whether the crop disaster payment to Bracewell is property of the bankruptcy estate under § 541(a)(1), which is an issue of first impression in this circuit. Section 541(a)(1) defines property of the bankruptcy estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The plain language of that provision is clear, and it makes the commencement of the bankruptcy case the key date for property definition purposes.[1] That means the property of the debtor's estate is

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[1] There is one wrinkle in cases, like the present one, which began as Chapter 12 proceedings but were converted to Chapter 7. Section 1207(a) of the Bankruptcy Code, which applies to Chapter 12 cases, expands the definition of property of the estate to include: "all property of the kind specified in such section [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title . . . ." 11 U.S.C. § 1207(a)(1). The practical effect of that expansion in the temporal

property the debtor had when the bankruptcy case commences, not property he acquires thereafter. Our most closely analogous decision, as well as the only two courts of appeals decisions that are directly on point, confirm that the clear temporal limitation which is so plain on the face of the statutory language controls.

The specific issue in *Witko v. Menotte (In re Witko)*, 374 F.3d 1040 (11th Cir. 2004), was whether a legal malpractice claim was property of the estate. *Id.* at 1042. After Witko filed a petition for bankruptcy, he was denied alimony in a separate legal proceeding. *Id.* at 1042. Thereafter, and while his bankruptcy case was still pending, Witko sued his divorce counsel for malpractice. *Id.* The trustee intervened, seeking a determination that Witko's malpractice claim was property of the estate. *Id.* We held that it was not, because a debtor's estate cannot be greater than the property rights the debtor had at the commencement of the case. *See id.* at 1042-43. We reasoned that: "Applying the appropriate state law, Witko's legal malpractice cause of action did not exist until his alimony action concluded with an adverse outcome that was proximately caused by his attorney's negligence," *id.* at 1043, and that outcome did not happen until after the commencement of the bankruptcy case. *Id.* at 1044. As a result, the property interest in the malpractice claim did not come into existence until after the bankruptcy case had already commenced. *Id.* The same is true here. Bracewell's property interest in a claim to payments under the Agricultural Assistance Act of 2003 did not come into

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limitation is to move the cutoff date for the acquisition of property from the filing of the bankruptcy case to the time it is converted under Chapter 7. In the present case that provision makes no difference because Bracewell's crop losses occurred before his bankruptcy petition was filed, and Congress' enactment of the legislation authorizing payments occurred not only after Bracewell's petition was filed but also after he converted it to a Chapter 7 proceeding. Probably for that reason, the parties do not mention § 1207(a)(1) but instead stake their positions regarding this issue on § 541(a)(1). We will focus our discussion on § 541(a)(1) as well.

existence or accrue until that legislation became law, which was after his bankruptcy petition had been filed.

The two federal appeals court decisions directly on point are *Drewes v. Vote (In re Vote)*, 276 F.3d 1024 (8th Cir. 2002), and *Burgess v. Sikes (In re Burgess)*, 438 F.3d 493 (5th Cir. 2006) (en banc). In the Eighth Circuit case the debtor, Vote, filed a bankruptcy petition on September 7, 1999, which was six weeks before legislation was passed providing payments for crop losses suffered during 1999. *Vote*, 276 F.3d at 1026. Thereafter, Vote received more than $33,000 under that legislation because he had not been able to plant a crop in 1999. *Id.* The Eighth Circuit held that the payments were not "legal or equitable interests of the debtor in property as of the commencement of the case" within the meaning of § 541(a)(1). *Id.* at 1027. It reasoned that to include the payments in the estate would give the trustee rights beyond those that Vote had at the commencement of the case, because Vote "had no interest of any kind" until the assistance legislation became law. *Id.*

The Fifth Circuit, sitting en banc, has also recently addressed this precise issue. The *Burgess* case involved disaster payments under the Agricultural Assistance Act of 2003, the same legislation involved in this case. *See Burgess*, 438 F.3d at 495. The only factual difference from this case is that Burgess had received a discharge from bankruptcy before the legislation was enacted. *See id.* The trustee filed a motion to re-open. *Id.* The Fifth Circuit held that the case should not be re-opened because the assistance payments were not property of the estate. *Id.* at 496. It began with the proposition that only property "'in which the debtor has a legal or equitable interest at the time of bankruptcy comes into the estate.'" *Id.* at 499 (quoting *Goff v. Taylor (In re Goff)*, 706 F.2d 574, 578 (5th Cir. 1983) (quotation marks omitted), *overruled on other grounds by Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242 (1992)). The debtor did not have a legal or equitable interest in crop loss

payments under legislation that had not been enacted at the time he filed his bankruptcy petition. *Id.* at 503. He had only a "mere hope" that legislation would be enacted providing payments to cover his crop loss. *Id.* If a hope at the time of filing were enough, the Court explained, "any postpetition legislation or contract could retroactively create property of the estate." *Id.* The *Burgess* court also held that the crop loss itself was not property of the estate which would bring in the disaster payment as proceeds. *Id.* If the fact that the crop loss preceded the filing were enough by itself, the language of § 541(a)(1) —"a legal or equitable interest as of the commencement of the case"—would have no effect. *Id.* There can be no legal or equitable interest in payment without law authorizing it, and at the time of filing that law did not exist. *See id.*

The Ninth Circuit's decision in *Sliney v. Battley (In re Schmitz)*, 270 F.3d 1254 (9th Cir. 2001), is in accord with these decisions although *Schmitz* presented a slightly different question. After the filing of his bankruptcy petition, Schmitz was awarded a fishing quota or right for future years. *Id.* at 1255. The quota was calculated based on Schmitz's pre-filing fishing history. *Id.* The Ninth Circuit held that the quota rights were not part of the bankruptcy estate because the regulations creating those rights were not adopted until after the bankruptcy petition was filed. *Id.* at 1257-58. Even though the quota was calculated based on Schmitz's pre-filing fishing history, that history had no value until the regulations were promulgated. *Id.* at 1257. At the time he filed, Schmitz had nothing beyond the hope based on his interest. *Id.*

Thus, the circuits that have considered the issue are in agreement that no legal or equitable interest exists until assistance legislation becomes law; before then the debtor has only a hope and maybe an expectation that legislation will be enacted for his relief, but that is not enough. *See In re Schmitz*, 270 F.3d at 1257 (holding that "a hope, a wish and a prayer" is insufficient under § 541(a)(1)). We join the other

circuits and conclude that until legislation was enacted authorizing the disaster payments and specifying the criteria for those payments, Bracewell had no legal or equitable interest in a payment. This is true even though before he filed his case he satisfied the criteria for payment that, as it turns out, Congress would eventually require. The fact that Congress regularly enacts this type of legislation did not give Bracewell any legal or equitable interest in the payment he would receive if Congress acted as it had in the past. "If" is a big word. *Cf. Barnette v. Evans*, 673 F.2d 1250, 1252 (11th Cir. 1982) (rejecting the rationale of a bankruptcy court that we characterized as: "if we had some ham, we could have ham and eggs, if we had some eggs").

Not until the enactment of the legislation elevated Bracewell's hope to an entitlement did it become an interest cognizable under § 541(a)(1). As the district court explained in its opinion in this case:

> Without the crop disaster legislation, growing crops and suffering crop loss—no matter how sufficiently rooted to the pre-bankruptcy past—are of no legal significance and create no right. This is why the bankruptcy court's statement, "Upon the occurrence of the disaster, [Appellant] had the right to collect disaster payments from the government, if such legislation [were] passed," employs circular reasoning. Indeed, it is the crop disaster legislation that makes growing and suffering certain crop losses relevant by attaching new legal consequences to events completed before the legislation's enactment.

Bracewell v. Kelley (In re Bracewell), 322 B.R. 698, 707 (M.D. Ga. 2005).

Our conclusion that a debtor has no cognizable interest in a payment that Congress has not yet authorized through legislation is also in accord with most of the bankruptcy courts that have considered the issue. *Cf. Boyett v. Moore (In*

re Boyett), 250 B.R. 817, 822 (Bankr. S.D. Ga. 2000); *Drewes v. Lesmeister (In re Lesmeister)*, 242 B.R. 920, 925 (Bankr. D.N.D. 1999). We are aware that *Lemos v. Rakozy (In re Lemos)*, 243 B.R. 96 (Bankr. D. Idaho 1999), is to the contrary but do not find that court's reasoning to be persuasive, a sentiment that is apparently now shared by the very court that issued the decision. *See In re Stallings*, 290 B.R. 777, 781 (D. Idaho 2003) (noting that "the legal landscape has changed" since the *Lemos* decision was issued).

The existence of § 1207, which we noted in passing earlier in this opinion, see p.7 n.1, above, provides an additional reason for concluding that § 541(a)(1)'s language defining property interests of the estate as those that existed "as of the commencement of the case" clearly is a temporal limitation. Congress enacted Chapter 12 of the Bankruptcy Code, the chapter under which Bracewell originally filed for bankruptcy, in 1986. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. 99-554, § 255, 100 Stat. 3088 (Oct. 27, 1986). Section 1207 expands, for cases falling under it, the definition of property of the estate under § 541 to include "all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first." 11 U.S.C. § 1207(a)(1). If § 541(a)(1) did not generally limit the property of the estate to that which existed at the time of filing, there would be no reason for § 1207(a)(1) to extend the cutoff point to the earlier of the closing, dismissal, or conversion date in Chapter 12 cases. Reading § 541(a)(1) the way the trustee and our dissenting colleague urge would render § 1207(a)(1) largely superfluous, and statutes ought to be read so that every provision has a purpose and field of operation. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be

superfluous, void, or insignificant.") (internal quotation marks omitted); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 1149 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous."); *Bouchar Transp. Co. v. Updegraff*, 147 F.3d 1344, 1351 (11th Cir. 1998) ("[W]e avoid statutory constructions that render provisions meaningless.").

B.

The dissenting opinion in this case follows the tracks of the *Burgess* dissenters and joins them on what is essentially one long, forced march against the plain language that governs the issue. Congress said "property as of the commencement of the case," 11 U.S.C. § 541(a)(1), and that is the language we must apply. The *Burgess* dissenters contended that § 541(a)(1) and (6) are "sufficiently broad to encompass the disaster payments." *Burgess*, 438 F.3d at 508 (Jones, C.J., dissenting). Their argument was that the purposes of bankruptcy require a "comprehensive administration of the debtor's property," which justifies a broad reading of § 541. *Id.* at 509. A broad reading is one thing; a reading contrary to the plain meaning of clear statutory language is another. Our dissenting colleague, like the dissenters in *Burgess*, would read § 541(a)(1)'s plain statutory language "as of the commencement of the case" so "broadly" that it no longer means "as of the commencement of the case." We do not question their good faith or the sincerity of their belief that construing the language as they do would better further what they see as the purposes of the Bankruptcy Code and their notion of good policy. We do, however, disagree with the implicit premise of their position: that it is the function of judges to modify legislative language to better suit what they perceive to be Congress' purposes and the felt necessities of their policy views.

The Supreme Court and this Court have warned on countless occasions against judges "improving" plain statutory language in order to better carry out what they

perceive to be the legislative purposes. *See, e.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 538, 124 S. Ct. 1023, 1032 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.") (internal quotation marks omitted); *Artuz v. Bennett*, 531 U.S. 4, 10, 121 S. Ct. 361, 365 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them. . . . [T]he text . . . may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted."); *Conn. Nat'l Bank*, 503 U.S. at 254, 112 S. Ct. at 1149 ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal quotation marks omitted); *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398, 104 S. Ct. 756, 764 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); *Wright v. Sec'y for Dept. of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002) ("Our function is to apply statutes, to carry out the expression of the legislative will that is embodied in them, not to 'improve' statutes by altering them."); *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (en banc) ("We will not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite it.").

If, in the face of plain statutory language, an opinion runs on about purposes and policies, it is a sure sign the revision knife is out and an effort is being made to slice and dice clear language to make way for the policy preferences of the writer. It justifies Justice Scalia's recent criticism that talk about "advancing 'the purpose of the Act'" is the "last resort of extravagant interpretation." *Rapanos v. United States*, __ U.S. __, __ S. Ct. __, 2006 WL 1667087, at *21 (June 19,

2006) (plurality opinion). As he explained, it is an approach that runs counter to the truth "that no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Id.* The dissenting opinion in this case refines the extravagant interpretation approach by suggesting that the statutory language "property as of the commencement of the case" is ambiguous as to whether it covers an interest created by a pre-petition crop loss. We disagree. The language is perfectly clear. It covers exactly what it says it covers, which are any interests that are "property as of the commencement of the case" and none that are not. If an interest is not property on the date a case is filed, it is not covered.

The *Burgess* dissenters relied primarily on two Supreme Court decisions, *Segal v. Rochelle*, 382 U.S. 375, 86 S. Ct. 511 (1966), and *United States v. Whiting Pools*, 462 U.S. 198, 103 S. Ct. 2309 (1983), both of which are readily distinguishable. In *Segal* the Supreme Court held that certain loss-carryback tax refunds were property of the bankruptcy estate. 382 U.S. at 380, 86 S. Ct. at 515. The debtors argued that the refunds were not property of the estate because, although the losses entitling them to the refunds were suffered before they filed their bankruptcy petitions, under the statutory scheme no refunds could be claimed until the end of the year. *Id.* at 380, 86 S. Ct. at 515. According to the Court, the purposes of the Bankruptcy Act, rather than a particular federal or state definition, would ultimately determine whether any particular item constituted property of the estate. *Id.* at 379, 86 S. Ct. at 515. The Court noted that "property" of the bankruptcy estate should be broadly construed and that "an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *Id.* The Court ultimately held that the refund claim was "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as

'property.'" *Id.* at 380, 86 S. Ct. at 515. According to the *Burgess* dissent, *Segal* means that a loss as of the date of bankruptcy "can later yield property includable in the debtor's estate." *Burgess*, 438 F.3d at 511.

The *Segal* decision cannot mean what the *Burgess* dissenters say it does about the present Bankruptcy Code, because *Segal* was decided twelve years before Congress overhauled the Bankruptcy Code in 1978. It was during that overhaul that Congress added the critical language of § 541(a)(1), restricting property of the estate to that which existed "as of the commencement of the case." *See DirecTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004) ("[C]hanges in statutory language generally indicate an intent of Congress to change the meaning of the statute.") (internal quotation marks, alterations, and citations omitted); *Muscogee Nation v. Hodel*, 851 F.2d 1239, 1444 (D.C. Cir. 1988) ("Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning."). The § 541(a)(1) definition, with its explicit temporal limitation, controls our analysis rather than *Segal*'s test. *See Burgess*, 438 F.3d at 498 ("*Segal*'s 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code."); *In re Vote*, 276 F.3d at 1026 ("To find for the trustee on the basis that the payments were 'sufficiently rooted' would allow the trustee to assert more rights than Vote had at the commencement of his case. The legislative history of the 1978 Bankruptcy Code makes clear that despite the broad scope of § 541, it is not intended to [expand] the debtor's rights against others more than they exist at the commencement of the case.") (internal quotation marks omitted). The *Segal* decision told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property. We will not attribute to the Supreme Court an intent to construe legislative language that it had not seen and which would not even exist for another dozen years.

Our dissenting colleague relies on the *Segal* decision, as did the *Burgess* dissenters, and we think that his reliance is misplaced for the same reasons theirs was. He does add another component to the argument about *Segal*. In support of the proposition that *Segal*'s "sufficiently rooted" test should be allowed to trump the later-enacted, plain language of § 541(a)(1), he cites our decision in *In re Alvarez*, 224 F.3d 1273 (11th Cir. 2000). In that case, as in our *Witko* decision, we had to determine whether the debtor's legal malpractice action was part of the bankruptcy estate. *Id.* at 1275. We held that it was. *Id.* at 1278. The basis for the legal malpractice action was the filing of the bankruptcy case itself. *Id.* at 1275. The debtor had instructed his attorney to file a Chapter 11 reorganization petition on his behalf, but that attorney filed a Chapter 7 petition instead. *Id.*

We began our analysis in *Alvarez* by examining the legal malpractice claim, looking to its elements under Florida law to determine exactly when the cause of action accrued. *Id.* at 1276-77. We determined that the cause of action had accrued under state law at the moment Alvarez's bankruptcy petition was filed and, therefore, concluded that Alvarez had a cause of action "as of the commencement" of his bankruptcy case which was property of the estate under § 541(a)(1). *Id.* at 1278. This is precisely the same analysis which we later applied in the *Witko* case and it is not dependent at all on the *Segal* "sufficiently rooted" analysis. *See Witko*, 374 F.3d at 1042-43. This is the holding of *Alvarez* and the analysis that we are bound to follow: we look to state law to determine when a claim arises, and if it arises on or before the commencement of the bankruptcy case, it is part of the bankruptcy estate.

The dissent has been led astray by some superfluous language in *Alvarez* which was not necessary to its holding. The *Alvarez* opinion says that it is not deciding if federal or state law governs the question of whether the malpractice action was property of the estate, because under either

approach the claim was property of the estate. *Alvarez*, 244 F.3d at 1276 ("We decline to decide the question of which law governs this determination, because in either event, we conclude that this legal malpractice claim is property of Alvarez's bankruptcy estate."). It examines Florida law and concludes that under it the claim would be property of the estate if state law governs the definition of property. It then explains why under the *Segal* test the claim would also be property of the estate if federal law governs the definition of property. *Id.* at 1278-79.

The real reason that the *Alvarez* panel did not have to decide whether state or federal law governed the definition of property for purposes of the bankruptcy estate is that question had already been decided. Prior panel decisions had held that the question of whether a debtor's interest in property is property of the estate is a federal question, but the definition of property, issues about the nature and existence of the debtor's interest, are issues of state law. *See, e.g., Hall Motors, Inc. v. Lewis (In re Lewis)*, 137 F.3d 1280, 1283 (11th Cir. 1998); *Southtrust Bank of Alabama v. Thomas (In re Thomas)*, 883 F.2d 991, 995 (11th Cir. 1989). The *Alvarez* panel was bound by those decisions, although its implication that the question was still open was harmless to that appeal since it did not affect the result. It has, however, confused our colleague. In any event, to the extent that anything in the *Alvarez* opinion supports the dissent's position it is contrary to the holdings in *In re Lewis* and *In re Thomas*, and under the prior panel precedent rule we are obliged to follow those earlier decisions. *See United States v. Hornaday*, 392 F.3d 1306, 1316 (11th Cir. 2004); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000). The *Witko* decision, which came after *Alvarez*, did the right thing in following the earlier panel decisions.

The *Burgess* dissenters' reliance on the Supreme Court's decision in *Whiting Pools* is also misplaced, but for a different reason. In that case the Court addressed the question

of whether certain personal property seized by the IRS the day before the debtor filed for bankruptcy was subject to being turned over to the debtor under § 542(a) of the Bankruptcy Code. *United States v. Whiting Pools*, 462 U.S. 198, 199-200, 103 S. Ct. 2309, 2310-11 (1983). The case was about § 542(a), but § 541(a)(1) was implicated because § 542(a) authorizes turnover of property in another's possession only if it is property of the estate. *See id.* at 205-07, 103 S. Ct. at 2313-15. For that reason, the Court had to determine whether the seized property the debtor wanted the IRS to return was property of the estate. The Court stated that "[a]lthough [section 541(a)(1) and section 542(a)] could be read to limit the estate to those interests of the debtor in property at the time of the filing of the petition, we view them as a definition of what is included in the estate, rather than as a limitation." *Id.* at 203, 103 S. Ct. at 2312. It is this statement that the *Burgess* dissenters seized upon. *See Burgess*, 438 F.3d at 510 (Jones, C.J., dissenting).

We do not read that decision as they do. We do not interpret the statement quoted from the *Whiting Pools* opinion to hold that § 541(a)(1) does not mean what it says; we do not interpret it to mean that provision does not impose a temporal limitation on the definition of property of the estate. Instead, we interpret the statement in the context in which it was made. The Court was dealing with property for which the debtor had legal title but not possession at the key time, which was the date the reorganization petition was filed in that Chapter 11 case.

The Court concluded in *Whiting Pools*, that "§ 542(a) grants to the estate a possessory interest in certain *property of the debtor* that was not held by the debtor at the commencement of reorganization proceedings." 462 U.S. at 207, 103 S. Ct. at 2314-15 (emphasis added). The Court applied the § 541(a)(1) temporal limitation to whether the debtor had legal title of the property at the time the estate was created, as we do here. It also held that § 541(a)(1) did not

require the debtor to have possession of the property, in addition to a legal or equitable interest in it, to the extent that § 542(a) permits the trustee to take possession.

In other words, in *Whiting Pools* the Court determined that § 541(a)(1) was "intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code," and that § 541(a)(1) would not limit other Code provisions which bring into the estate property that the debtor did not have a possessory interest in at the time of filing. *Id.* at 205, 103 S. Ct. at 2314-15. Thus, in *Whiting Pools*, the debtor did have interests in the disputed property "as of the commencement of the case." The *Whiting Pools* opinion explains how § 542(a) works together with § 541(a)(1). It does not purport to decide how § 541(a)(1) operates in a case, like this one, in which § 542(a) is not implicated.

Our dissenting colleague argues that decisions of the Supreme Court and this Court establish that a crop loss automatically creates property rights. The Supreme Court cases that the dissent relies on are two cases from the 1800's, *Williams v. Heard*, 140 U.S. 529, 11 S. Ct. 885 (1891), and *Milnor v. Metz*, 41 U.S. 221 (1842). Of course, both of those decisions pre-date the adoption of the Bankruptcy Code, and the critical language we are interpreting, by a century or so. Not only that, but both cases are distinguishable because the debtors had claims which pre-existed their bankruptcy filings. In *Williams* the Court noted that "the act of congress did not create the rights. They had existed at all times since the losses occurred." *Williams*, 140 U.S. at 541, 11 S. Ct. at 888. Similarly, in *Milnor* the Court noted that if "a similar claim on the part of Milnor [had] existed against an individual, instead of the government, then there can be no doubt, he could have recovered by suit . . . . As the government was equally bound to do its debtor justice, in a different mode, with an individual, we think no sound distinction exists in the two cases." *Milnor*, 41 U.S. at 227. Those two statements

indicate why those cases were different from this case. The debtors had pre-existing claims which were property of the estate. In this case there was only the crop loss itself with no claim of entitlement arising from it until Congress created one. The crop loss was the result of an act of nature and by itself did not give rise to a claim against anyone. Bracewell had no right to be compensated until Congress enacted the legislation giving him a right and that did not occur until after he had filed for bankruptcy, or in the critically important words of § 541(a)(1), not until after "as of the commencement of the case."

Like the Supreme Court decisions our dissenting colleague relies upon, our decisions in *Witko* and *Alvarez* do not support the proposition that a loss creates a contingent interest which may be property of the bankruptcy estate. The dissenting opinion makes the same error with respect to both cases, asserting that in each we decided whether the debtor's malpractice suit was property of the estate by determining whether the debtor had suffered harm pre-petition. All that *Witko* and *Alvarez* recognize in this respect is that suffering harm is a necessary, although not sufficient, element of a legal malpractice claim under the relevant state law in both cases. In both cases the Court determined whether all the elements of a malpractice cause of action, including the suffering of harm, existed at the time the debtors filed their bankruptcy petition. Neither decision held or implied that harm alone would be legally sufficient. Instead, what we did in *Witko* and *Alvarez* is what we have done here, which is determine whether on the date the bankruptcy case commenced the debtor had an enforceable property right—there a malpractice claim, here a claim for crop loss payments under a congressional act.

III.

The next question we address is whether anything in § 541(a)(6) expands the definition of property enough to encompass the disaster relief payment Bracewell received.

That provision extends the definition of property of the estate to include "[p]roceeds, product, offspring, rents, or profits of or from property of the estate . . . ." 11 U.S.C. § 541(a)(6). The key language for present purposes is that the proceeds must be "of or from property of the estate." *See id.* If the property of the estate does not include a potential future payment that the debtor is not legally entitled to receive at the time of filing, nothing in § 541(a)(6) pushes the later-acquired legal or equitable interest back into the estate. As we have discussed at some length already, Bracewell did not have a cognizable interest in his hoped for relief payment until the Agriculture Assistance Act of 2003 came into being, and that occurred after he had already filed his petition. Thus, the property of his estate did not include an interest that could generate proceeds.

We are not persuaded by the trustee's contention that the payments are proceeds because they relate back to a pre-petition crop. He argues that the payment is a substitute or compensation for the portion of the debtor's crops that did not grow because of the disaster. We agree that any compensation the debtor receives directly from disposition of the pre-petition crops, after the filing date, is proceeds of property of the estate. However, in the Agricultural Assistance Act of 2003 Congress did not purport to purchase the ruined crops of farmers like Bracewell. Instead, Congress provided *assistance* to farmers like him because of losses they had suffered in the past. *See* Agricultural Assistance Act of 2003, § 202(a) ("The Secretary . . . shall use such sums as are necessary . . . to make emergency financial assistance available to producers on a farm that have incurred qualifying losses for the 2001 or 2002 crop of an agricultural commodity due to damaging weather or related condition . . ."). Because this assistance was not given in exchange for property of the estate, it is not proceeds of property of the estate.

The en banc Fifth Circuit reached this same conclusion in the *Burgess* case. *See Burgess*, 438 F.3d at 503. It held that

Burgess, whose situation is identical to Bracewell's, had no interest in property at the commencement of the bankruptcy case that could mature into the crop disaster payment. *Id.* at 504. As the court explained, "[i]f Burgess had no right or interest that constituted property within the meaning of § 541(a)(1) at the commencement of the case, then the payment he later received cannot be proceeds of property of the estate under § 541(a)(6)." *Id.* at 499.

The dissenters in *Burgess* and our dissenting colleague assert that under the applicable state law the disaster payments would be characterized as proceeds of the lost crops. *Id.* at 517; dissenting opinion at 56-60. The argument is that under Georgia law collateral includes "inchoate rights, in any and all crops to be planted, grown or produced on [the] property in the future," dissenting opinion at 56-57 (quoting *Sw. Ga. Prod. Credit Ass'n v. James*, 350 S.E.2d 786, 788 (Ga. Ct. App. 1986), and proceeds are "claims arising out of the loss[] . . . or damage to the collateral." *Id.* (quoting O.C.G.A. § 11-9-102(a)(63). While we do look to state law to define what is property, the dissenting position overlooks the fact that "whether a debtor's interest constitutes property of the estate is a federal question." *Lewis*, 137 F.3d at 1283 (quotation marks omitted). Therefore, a property interest, however it is characterized by state law, can only be property of the estate if it is within the definition contained in the federal Bankruptcy Code. Under § 541(a)(6) that interest must be "[p]roceeds . . . of or from property of the estate" in order to be property of the bankruptcy estate. 11 U.S.C. § 541(a)(6). And to be property of the estate for proceeds generating purposes, it must have been property of the estate at the time the bankruptcy petition was filed.

The dissenters also worry about problems that would result for debtors and creditors if the payments are defined as proceeds by state law but not included in the bankruptcy estate. If there is any cause for concern about that, the fact remains that we are not commissioned to cure problems in the

operation of statutory schemes Congress has designed. The Supreme Court has pointedly stated that "[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement," *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398, 104 S. Ct. 756, 764 (1984), and we have recognized that "[o]ur function is to apply statutes, to carry out the expression of the legislative will that is embodied in them, not to 'improve' statutes by altering them." *Wright v. Sec'y for Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002). If there are problems with the way a statute operates, Congress can alter the statute to eliminate those problems; we cannot. Only judicial activists use interpretation as a tool for improving statutes to their liking, and none of us are judicial activists.

To be sure, there is some support in the decisions of bankruptcy courts for the position that crop disaster payments to which a debtor becomes entitled after filing or conversion are proceeds under § 541(a)(6). *See FarmPro Servs., Inc. v. Brown (In re FarmPro Servs., Inc.)*, 276 B.R. 620 (D. N.D. 2002); *Lemos v. Rakozy (In re Lemos)*, 243 B.R. 96 (Bankr. D. Idaho 1999); *White v. United States (In re White)*, No. BRLBB-00971C, 1989 WL 146417 (Bankr. N.D. Iowa Oct. 27, 1989). We are aware of those decisions but do not find them to be persuasive. None of them raises an argument that we have not already addressed. They all fail to give full allegiance to the congressional will manifested in the plain language of the Bankruptcy Code.

The trustee attempts to analogize disaster assistance to insurance payments. Insurance payments are explicitly included in the UCC definition of "proceeds," U.C.C. § 9-306(1), and there is authority for the proposition that the bankruptcy Code's definition of "proceeds" is at least as broad as the UCC definition. *See, e.g., Unsecured Creditors Comm. v. Marepcon Fin. Corp. (In re Bumper Sales, Inc.)*, 907 F.2d 1430, 1437 (4th Cir. 1990). There is a difference between insurance payments stemming from the destruction

of property in the estate and disaster assistance authorized after the estate was created as a result of property that was destroyed before the estate came into being.

The analogy to insurance would be closer if an assistance payment were for losses suffered to crops that were in the estate at the time the petition was filed. That, however, is not what happened here. The relief payment did not stem from any loss to property of the estate, because the crops were already lost before the estate came into being. Still, if the debtor had at the time of filing a legal or equitable right to a payment for crop losses, the situation would be like one in which the debtor had a right to insurance proceeds at the time of filing. *See First State Bank of Abernathy v. Holder (In re Nivens)*, 22 B.R. 287, 291 (Bankr. N.D.Tex. 1982). But, as we held earlier, there is no legal or equitable right to crop assistance payments until the authorizing legislation is enacted.

For these reasons we agree with the Fifth Circuit's holding in *Burgess* that if Bracewell "had no right or interest that constituted property within the meaning of § 541(a)(1) at the commencement of the case, then the payment he later received cannot be proceeds of property of the estate under § 541(a)(6)." *Burgess*, 438 F.3d at 499. If the law creating the right to a disaster payment exists before the debtor files for bankruptcy and the debtor subsequently applies for and receives the payment, it could be proceeds of property of the estate. But if the disaster assistance legislation is not law at the time of filing, the debtor at that time has no legal or equitable interest in the payment and so there is no property of the estate to generate proceeds.

IV.

Because the crop disaster payment made to Bracewell was not property of the bankruptcy estate under § 541(a)(1) or § 541(a)(6), the district court's order is AFFIRMED.

PRYOR, Circuit Judge, dissenting:

"'If' is a big word," *Bracewell v. Kelley*, No. 05-11951, slip op. at 9 (11th Cir. June 30, 2006), but it is not the determinative word in this appeal for two reasons. First, Bracewell's crop disaster payment is part of the debtor estate because "property of the estate" includes the contingent interest in disaster relief created by a reduced yield. *See* 11 U.S.C. § 541(a)(1). Second, Bracewell's crop disaster payment is "proceeds . . . from property of the estate" under the settled state law of property rights. 11 U.S.C. § 541(a)(6). I respectfully dissent.

I. BACKGROUND

I first explain the history of the Agricultural Assistance Act of 2003 and its interaction with Bracewell's conversion under Chapter 7. The majority opinion appropriately and accurately explains what we know from the record: A drought caused Bracewell to suffer lower-than-expected yields. On May 29, 2002, because Bracewell was unable to pay for his farm-related debt, Bracewell filed a petition under Chapter 12 of the Bankruptcy Code. In a Chapter 12 proceeding, Bracewell's crop disaster payment would have been included in the bankruptcy estate. Although not part of the record or evidence, other events illustrate the potential for abuse that the decision of the majority allows.

In the real world, in June 2002, a month after Bracewell filed his bankruptcy petition, several members of Congress announced to the press that they had begun work to provide drought assistance to farmers. *See, e.g.*, Press Release, Congressman Tom Osborne, Osborne Refuses to Send Congress Home Without Securing Drought Assistance (Oct. 16, 2002), *available at* http://www.house.gov/apps/list/press/ne03_osborne/pr20021016crno.html. In July, Congressman John Thune sponsored the Emergency Farmer and Rancher Assistance Act of 2002 to grant relief for crop losses in 2001 and 2002. H.R. 5310, 107th Cong. (2002).

Congress recessed at the end of that year before the legislation was enacted. *Id.*

On Friday, January 3, 2003, Bracewell converted his case under Chapter 7. Four days later, on Tuesday, January 7, 2003, Congress reconvened, and the drought assistance legislation was reintroduced in the House as part of an appropriations bill. 108 Bill Tracking H.J. Res. 2. On February 20, 2003, Congress enacted the Agricultural Assistance Act of 2003, which provided financial assistance to farmers who suffered crop losses in 2001 and 2002. *Id.* As the record shows, Bracewell then argued successfully that the money he later received from the government should not be included in the bankruptcy estate because he converted his case under Chapter 7 before Congress enacted the Agricultural Assistance Act of 2003.

I have no idea whether Bracewell knew about the proceedings in Congress that led to the enactment of the Agricultural Assistance Act of 2003. There is no evidence that he did, but we should not be oblivious to the possibility that some farmers already pay attention to these sorts of matters, and the majority opinion will cause farmers in bankruptcy to monitor them more closely. The workings of Congress are reported by the press, and farmers who suffer natural disasters already have incentives to investigate the likelihood of forthcoming relief. The majority opinion now gives them even more incentives. As we consider whether losses that ripen into post-petition gain are included in the debtor estate, the background of these real-world consequences should not be forgotten. *See* Fed R. Evid. 201 advisory committee's note ("The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito ergo sum*." (quoting Kenneth Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *in* Perspectives of Law 69, 73 (1964)).

In the context of this chronology, it becomes clear why the decision of the majority runs contrary to the policy goals of the Bankruptcy Code. Three fundamental policies of the Bankruptcy Code are (1) to discourage a race of creditors to the courthouse, *Union Bank v. Wolas*, 502 U.S. 151, 161, 112 S. Ct. 527, 533 (1991), (2) to preserve the security interests of creditors, *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S. Ct. 2309, 2313 (1983), and (3) "to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy." *Butner*, 440 U.S. at 55, 99 S. Ct. at 918 (internal quotations and citation omitted). Instead of discouraging a creditors' race to the courthouse, the decision of the majority encourages debtors who are farmers to race to the courthouse to file or convert cases under Chapter 7 before Congress enacts farm assistance bills. Instead of preserving creditors' security interests, the decision of the majority impairs security interests in crops damaged by natural disasters. Instead of a fresh start for debtors, the decision of the majority grants debtors who are farmers a windfall. A thorough inspection of the statutory language, precedents of the Supreme Court and our Court, and the legislative history of the Bankruptcy Code compels me to conclude that Congress did not intend to overturn the settled policy goals of bankruptcy in this circumstance.

II. DISCUSSION

My discussion is divided in two parts. I first look to the Bankruptcy Code, Supreme Court precedent, and legislative history to address the erroneous assumption of the majority that a loss incurred before the commencement of bankruptcy does not create a contingent interest that is "property of the estate." 11 U.S.C. § 541(a)(1). I next review the state law of property rights to conclude that Bracewell's crop disaster payment is "proceeds of the estate." 11 U.S.C. § 541(a)(6). Under either view, the decision of the district court to exclude Bracewell's crop disaster payments from the debtor estate was wrong.

A. A Contingent Interest Created by a Loss Is "Property" of the Debtor Estate.

Section 541(a)(1) of the Bankruptcy Code provides that property of the debtor estate "is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). All property interests of the debtor vest in the bankruptcy estate when the debtor files for bankruptcy. *See* 11 U.S.C. § 301; *In re Alvarez*, 224 F.3d 1273, 1277 (11th Cir. 2000). "Property" has a broad meaning that encompasses "everything of value the bankrupt may possess in alienable or leviable form when he files his petition." *Segal v. Rochelle*, 382 U.S. 375, 379, 86 S. Ct. 511, 515 (1966). Section 541 is "a definition of what is included in the estate, rather than . . . a limitation" on the estate. *Whiting Pools*, 462 U.S. at 203, 103 S. Ct. at 2312.

Although the majority finds the statutory language of section 541(a)(1) "clear" and "so plain," *Bracewell*, slip op. at 4-5, I do not. I am unable to find any mention in section 541(a)(1) about whether an interest created by a pre-petition crop loss constitutes "property as of the commencement of the case." 11 U.S.C. § 541(a)(1). If anything, the definition of "property" as "*all* legal or equitable interests . . . as of the commencement of the case," *id.* (emphasis added), suggests that Bracewell's crop loss is a contingent interest in property included in the bankruptcy estate, but the text of section 541 does not resolve that issue definitively.

The majority's alleged reliance on statutory text rests not on the plain language, but on two unsound assumptions. First, the majority assumes that a contingent interest in the form of a reduced yield is not a "legal or equitable interest" in property. Second, the majority assumes that whether a property interest exists "as of the commencement of the case" depends on the date of the enabling legislation for the crop disaster payment, instead of the date of the crop loss. The statutory language, legislative history, and controlling

precedents from the Supreme Court establish that both assumptions are erroneous.

Two principles govern whether a loss incurred pre-petition is an interest included in the debtor estate. First, contrary to the majority's first assumption, a loss may give rise to a property interest before enabling legislation grants payment for the loss. *Williams v. Heard*, 140 U.S. 529, 541, 11 S. Ct. 885, 888 (1891). Second, contrary to the majority's second assumption, whether an interest accrued "as of the commencement of the case," 11 U.S.C. § 541(a), is determined by reference to the date the loss is incurred, *not* the date the payment is received, *see Williams*, 140 U.S. at 541, 11 S. Ct. at 888. A post-petition gain is "sufficiently rooted in the pre-bankruptcy past" if a corresponding loss was incurred pre-petition. *See Segal*, 382 U.S. at 380, 86 S. Ct. at 515.

The Supreme Court has held that the debtor estate includes contingent interests that ripen into legal rights after commencement of the bankruptcy proceeding. In *Segal*, the Court held that a potential loss-carryback tax refund constituted "property" under the Bankruptcy Code. 382 U.S. at 381, 86 S. Ct. at 516. The Court stated that "property" under section 541 is "construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *Id.* at 379, 86 S. Ct. at 515. Although the debtor in *Segal* could not establish a right to a tax refund until the end of the tax year, "postponed enjoyment does not disqualify an interest as 'property'" and "contingency in the abstract is no bar." *Id.* at 380, 86 S. Ct. at 515. The Court explained that "taxes had been paid on net income within the past three years, and the year of bankruptcy at that point exhibited a net operating loss." *Id.* Because the prospective refund was "sufficiently rooted in the prebankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start,"

the tax refund, once received, was included in the debtor estate. *Id.*

To avoid the binding authority of Segal, the majority argues that Segal was superseded by the enactment of the Bankruptcy Code. The majority states that it "will not attribute to the Supreme Court an intent to construe legislative language that it had not seen and which would not even exist for another dozen years." *Bracewell*, slip op. at 17. As support, the majority cites to *Drewes v. Vote (In re Vote)*, 261 B.R. 439, 443-44 (B.A.P. 8th Cir. 2001), and *Burgess v. Sikes (In re Burgess)*, 438 F.3d 493, 498 (5th Cir. 2006) (en banc), where the Bankruptcy Appellate Panel for the Eighth Circuit and the Fifth Circuit respectively distinguished *Segal* to conclude that crop disaster payments are not part of the debtor estate.

The court in *Vote* limited the test in *Segal* to tax refunds because of the legislative history of the Bankruptcy Code. The court explained that Congress may have intended to limit the holding of *Segal* to tax refunds when it enacted the new Bankruptcy Code. *Vote*, 261 B.R. at 443-44. Because the court found the precedential value of *Segal* to be questionable and the crop disaster legislation was enacted post-petition, the court concluded that such payments are not part of the debtor estate. *Id.*

The Fifth Circuit also distinguished *Segal* because "although Congress has specifically approved of *Segal*'s result, *Segal*'s 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code." *Burgess*, 438 F.3d at 498. The court in *Burgess* explained that the statutory language considered in *Segal* is different from the language of section 541. "Thus, under current law, a debtor's interest in property may be contingent . . . until after bankruptcy, but the debtor must have had a prepetition legal interest nonetheless." *Id.* at 499. The Fifth Circuit concluded that the debtor had no legal interest in the crop disaster payment "because the

legislation authorizing the payment had not yet been enacted." *Id.*

The statutory text, our precedent, and legislative history establish that "[t]here is little or no support" for the view of the majority and the Fifth Circuit that the current Bankruptcy Code superseded the holding in *Segal*. *Id.* at 512 (Jones, C.J., dissenting). First, section 541 did not supersede *Segal* because Congress did not materially alter the text of the statute. The previous version of the Code provided, "The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt *as of the date of the filing* of the petition . . . to *all of the following kinds of property wherever located*." 11 U.S.C. § 110(a) (1964) (emphases added). The current version of the Code provides that property of the estate "is comprised of *all the following property, wherever located* and by whomever held: . . . all legal or equitable interests of the debtor . . . *as of the commencement of the case*." 11 U.S.C. § 541(a)(1) (emphases added). "[A]bsent express indications to the contrary, the reenactment of statutes in substantially the same form or their wholesale adoption into other statutory schemes is presumed to perpetuate and incorporate the judicial baggage that has accumulated in relation to those provisions." *Rivers v. Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), *vacated on other grounds*, 456 U.S. 968, 102 S. Ct. 2228 (1982). The majority does not respond to this argument. The change in statutory language is legally insignificant because the broad definition of "property" and the temporal limitation considered in *Segal* continues in the current version of section 541(a)(1).

Second, our Court has applied *Segal* twice to guide our interpretation of the current Bankruptcy Code. *See, e.g.*, *Witko v. Menotte (In re Witko)*, 374 F.3d 1043 (11th Cir. 2004), *Alvarez*, 224 F.3d at 1278. We stated, in *Alvarez*, that although "*Segal* was decided under the 1898 Act, nothing in the changed language suggests a change in the relevant *Segal*

holding." 224 F.3d at 1278 n.13. In *Witko*, the decision upon which the majority principally relies, we discussed *Segal* at length and relied on *Segal* for the proposition that a trustee may "seek the interests existing, though still undetermined in quantity, at the time the debtor filed his petition." *Witko*, 374 F.3d at 1043. Other circuits likewise have applied the rationale in *Segal*. *See, e.g.*, *In re Yonikus*, 996 F.2d 866, 869 & n.3 (7th Cir. 1993); *In re Schneider*, 864 F.2d 683, 685 (10th Cir. 1988); *In re Ryerson*, 739 F.2d 1423, 1426 (9th Cir. 1984). These decisions explain that the precedential value of *Segal* was not diminished by the enactment of the current Bankruptcy Code.

Third, the majority ignores the legislative history of the current code, which states that Congress endorsed the conclusion in *Segal*. "The result of *Segal v. Rochelle*, 382 U.S. 375, 15 L. Ed. 2d 428, 86 S. Ct. 511 (1966), is followed . . . ." *See* S. Rep. No. 989, 95th Cong., 2d Sess. 82, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868; H.R. Rep. No. 595, 95th Cong., 1st Sess. 367, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; *see Alvarez*, 224 F.3d at 1279 n.13 (stating that "the legislative history expressly indicates that the current Code follows *Segal*'s result"). Despite a professed concern about erroneously ascribing an intent to the Supreme Court, the majority readily ascribes a dubious intent to Congress based on, at best, ambiguous language without resorting to legislative history. *Cf. CBS v. Primetime 24 J.V.*, 245 F.3d 1217, 1224 (11th Cir. 2001). A consistent reading of both the earlier and later statutory language, the guidance derived from decisions of our Circuit and sister circuits, and the legislative history leads me to conclude that the current Bankruptcy Code did not supersede the holding in *Segal*.

Two venerable decisions of the Supreme Court buttress the holding in *Segal*. *See Williams v. Heard*, 140 U.S. 529, 11 S. Ct. 885 (1891); *Milnor v. Metz*, 41 U.S. (16 Pet.) 221 (1842). These precedents establish that property rights are "created by reason of losses having been suffered," *Williams*,

140 U.S. at 541, 11 S. Ct. at 888, not by later legislation that provides compensation for those losses. Each of these decisions supports the Trustee's argument that Bracewell's crop loss was a contingent property interest when he filed for bankruptcy.

The later decision, *Williams*, involved a payment created by Congress for a loss suffered during the Civil War. *Id.* at 539, 11 S. Ct. at 887. The debtor in *Williams* had insured ships damaged in the Civil War. *Id.* at 539-40, 11 S. Ct. at 887. He filed for bankruptcy in 1875 and obtained a discharge in 1877. *Id.* at 539, 11 S. Ct. at 887. In 1882, five years after the discharge from bankruptcy, Congress passed legislation to distribute money awarded to the United States from a treaty executed with Great Britain. *Id.* The debtor was awarded compensation based on this legislation. *Id.* The Supreme Court included the distribution from the treaty in the bankruptcy estate because "[t]here [was] . . . at all times *a possibility* that the government would see that [those who suffered harm] were paid." *Id.* at 541, 11 S. Ct. at 888 (emphasis added). The Court explained that "there was at all times a moral obligation on the part of the government to do justice to those who had suffered in property. . . . [T]he act of Congress did not create the rights. They had existed at all times since the losses occurred." *Id.*

The earlier decision, *Milnor*, reached the same result for a debtor who received a payment based on post-petition legislation. 41 U.S. at 227. In *Milnor*, the debtor was a gauger in the port of Philadelphia. 41 U.S. at 225. In 1836, an act of Congress reduced duties upon wine that required the debtor to perform extraordinary services "at the instance of the government" without compensation. *Id.* at 226. In 1839, the debtor filed for bankruptcy, and in 1840, Congress enacted legislation that compensated the debtor for his services. *Id.* at 224. Although Congress enacted legislation that granted compensation post-petition and "no claim existed against the United States, which could be judicially

recognised as 'property'" before the debtor filed for bankruptcy, the Court included the compensation in the debtor estate. *Id.* at 227.

The majority opinion and the Fifth Circuit distinguished *Milnor* and *Williams* on the grounds that both cases "predate the enactment of the current Bankruptcy Code by approximately 100 years" and "stand for the proposition that a prepetition loss is property of the estate if it gives rise to a prepetition legal claim or interest." *Burgess*, 438 F.3d at 503; *see Bracewell*, slip op. at 22-23. The *Burgess* court explained that the debtor in *Milnor* had a pre-petition legal interest because "even though [debtor] Milnor could not sue the government for the amount of the debt, the debt still existed." *Burgess*, 438 F.3d at 504. The court also distinguished *Williams* because "the debtors had a legal claim against someone," while the bankrupt farmer in *Burgess* "had no claim against anyone." *Id.* at 505. I find both reasons unpersuasive.

That *Williams* and *Milnor* were decided before the enactment of the Bankruptcy Code does not blunt their proposition that "even a prepetition loss of the debtor's property may itself constitute property when subsequent events afford a recovery for the loss." *Id.* at 512 (Jones, C.J., dissenting). It is fair to conclude that Congress was aware of the law of property rights as recognized in bankruptcy when it enacted the current version of the Bankruptcy Code because "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-97, 99 S. Ct. 1957-58 (1979). Although the Courts in *Williams* and *Milnor* did not consider the current version of section 541(a), they nonetheless confronted what is a "legal or equitable interest" included in the debtor estate. *Compare Williams*, 140 U.S. at 538, 11 S. Ct. at 887 ("[N]o individual claimant had, as a matter of strict *legal or equitable right*, any lien upon the fund awarded, nor was Congress under any *legal or equitable*

obligation to pay any claim out of the proceeds of that fund." (emphases added)), *and Milnor*, 41 U.S. at 226 (analogizing the debtor's right to cases where debtors had no "equitable or legal set-off"), *with* 11 U.S.C. § 541(a) ("Such estate is comprised of . . . all *legal or equitable* interests . . . ." (emphasis added)). Both decisions are applicable to Bracewell's crop disaster payment because they address the limits of a contingent property interest in the bankruptcy context.

The factual distinctions between *Williams* and *Milnor*, on the one hand, and Bracewell's crop disaster payment, on the other hand, are immaterial. Although in *Milnor* "[t]he services performed by Milnor were at the instance of the government" and "the government was equally bound to do its debtor justice," *Milnor*, 41 U.S. at 227, Milnor had no enforceable right against the government when he filed for bankruptcy. Although the Fifth Circuit found significant in *Williams* that "the debtors had a legal claim against someone," *Burgess*, 438 F.3d at 505, the fact remains that the debtor had no enforceable rights against *the government*. *See Williams*, 140 U.S. at 538, 11 S. Ct. at 887 ("[N]o individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded."). Although the possibility was remote that Britain would compensate American casualties of war and Congress would enact legislation that granted relief five years after the debtors were discharged from bankruptcy, the Supreme Court concluded this eventuality was sufficient to create a contingent interest to be included in the debtor estate. *See id.* ("Congress [was] under [no] legal or equitable obligation to pay any claim out of the proceeds of that fund."). The contingent interests held by the debtors in *Williams* and *Milnor* were premised on their pre-petition losses and the possibility, however remote, of compensation.

As in *Williams*, "[t]here was at least a possibility" that Congress would enact legislation to grant Bracewell relief, *id.*, because "[g]overnment payments to farmers have long

represented a major source of income for American farmers and ranchers," John K. Pearson, *Lien on Me: Revised Article 9 and Government Entitlement Program Payments*, 22-8 Am. Bankr. Ins. J. 24, 24 (2003). Bracewell's crop loss established "a possibility coupled with an interest" sufficient to be included in the debtor estate. *Williams*, 140 U.S. at 538, 11 S. Ct. at 887. The crop loss that Bracewell suffered pre-petition established a contingent property interest that ripened into a gain post-petition due to legislation enacted by Congress. "But the act of Congress did not create the rights. They had existed at all times since the losses occurred." *Id.* at 541, 11 S. Ct. at 888.

Under both *Williams* and *Milnor*, the inclusion of Bracewell's crop disaster payment in the debtor estate neither renders the phrase "as of the commencement of the case" meaningless nor runs "contrary to the plain meaning of the clear statutory language." *Bracewell*, slip op. at 12. The concern of the majority that "any postpetition legislation or contract could retroactively create property of the estate," *id.*, slip op. at 7 (citing *Burgess*, 438 F.3d at 503), is misplaced, because contingent interests, including losses, incurred after the commencement of the proceedings are not included in the debtor estate. Only contingent property interests that exist "as of the commencement of the case" can benefit the estate when those interests later ripen into post-petition gain.

Until today, our decisions have not deviated from these principles. We have stated, for example, that a legal malpractice complaint filed post-petition is "sufficiently rooted in the pre-bankruptcy past" to be included in the debtor estate. *Alvarez*, 224 F.3d at 1275. In *Alvarez*, we concluded that a debtor's malpractice suit accrued pre-petition under Florida law because the debtor, Alvarez, suffered harm pre-petition. *Id.* at 1277-78. Although Alvarez filed the malpractice complaint after the bankruptcy petition, Alvarez had suffered "sufficient injury to indicate that Alvarez had a cognizable interest" pre-petition. *Id.* at 1277. Because

Alvarez "established an attorney-client relationship . . . prior to his filing for bankruptcy, and this cause of action arises directly out of Alvarez's interactions with the firm prior to filing," we applied the rationale of *Segal* to conclude that the malpractice complaint was included in the bankruptcy estate. *Id.* at 1278-79.

The majority's reliance on *Witko*, rather than *Alvarez*, is misplaced. In contrast with *Alvarez*, in *Witko* we excluded a complaint filed post-petition from the debtor estate because the debtor suffered harm post-petition. *See Witko*, 374 F.3d at 1043. Witko filed for bankruptcy in 1999. *Id.* at 1042. In 2000, Witko was denied alimony in a marital dissolution and he filed a malpractice suit against his divorce counsel. *Id.* We stated that "interests existing, though still undetermined in quantity, at the time the debtor filed his petition" are included in the debtor estate. *Id.* at 1043. We looked to Florida law and concluded that Witko's malpractice suit had not accrued before he filed his petition for bankruptcy because "[w]hen Witko filed his bankruptcy petition he had not yet suffered any harm." *Id.* at 1043-44. *Witko* is inapposite to this appeal because, unlike Bracewell, the debtor in *Witko* did not suffer a loss until after the commencement of the bankruptcy case.

Consistent with our precedent in *Alvarez*, the crop disaster payment Bracewell received is "property as of the commencement of the case." Bracewell planted his crops pre-petition, Bracewell lost his crops pre-petition, and the Act compensated Bracewell for the crop loss that occurred pre-petition. Bracewell's crop loss "point[ed] toward realization of a refund . . . at the time the[] bankruptcy petition[] [was] filed," *Segal*, 382 U.S. at 380, 86 S. Ct. at 515, because "Congress frequently and regularly enacts a variety of farm subsidy programs," *Lemos v. Rakozy (In re Lemos)*, 243 B.R. 96, 99 (Bankr. D. Idaho 1999). The crop disaster payment is "sufficiently rooted in the pre-bankruptcy past." *Segal*, 382 U.S. at 380, 86 S. Ct. at 515.

The majority finds solace in decisions of our sister circuits that have excluded crop disaster payments from the debtor estate when those payments were received post-petition. *See Burgess*, 438 F.3d at 497; *Vote*, 261 B.R. at 442. These courts and the majority have focused on the date that the legislation is enacted, instead of the date of the loss, to exclude crop disaster payments from the debtor estate. *See Bracewell*, slip op. at 7-8; *Burgess*, 438 F.3d at 499 ("[H]e did not have a prepetition claim to, or interest in, the disaster-relief payment because the legislation authorizing the payment had not yet been enacted."); *Vote*, 276 F.3d at 1026 ("Before Congress passed the Appropriations Act, [the debtor] had no interest of any kind."). As the Eighth Circuit reasoned, because "there was no *assurance* that Congress would authorize such payments or that the Debtor would qualify for them if they were authorized," the crop disaster payments are not included in the debtor estate. *Vote*, 276 F.3d at 444 (emphasis added).

In the light of Supreme Court precedent, I find the reasoning of both the majority and our sister circuits, in *Burgess and Vote*, unpersuasive. That Congress enacted the legislation post-petition is not outcome determinative because a loss, by itself, may create a property interest without congressional legislation. *Williams*, 140 U.S. at 541, 11 S. Ct. at 888. When the loss accrues "as of the commencement of the case," it is included in the debtor estate.

The reliance of the majority on another decision of a sister circuit, *In re Schmitz*, 270 F.3d 1254 (9th Cir. 2001), is misplaced. The Ninth Circuit in *Schmitz* held that fishing rights assessed post-petition based on the debtor's fishing history "were not property of the bankruptcy estate because the regulations creating them were not adopted until after the bankruptcy petition was filed." *Id.* at 1256. *Schmitz* is inapposite to this appeal because, unlike Bracewell, the debtor in *Schmitz* did not suffer a loss before he filed for bankruptcy that was compensated by post-petition legislation.

Although, as the majority states, "'If' is a big word," *Bracewell*, slip. op at 9, it is not the determinative word because "property" includes contingent interests. *Segal*, 382 U.S. at 379, 86 S. Ct. at 515. The contingent nature of Bracewell's interest is similar to a loss carryback that may result in a tax refund if the taxpayer has the proper tax characteristics at the end of the year, *Segal*, 382 U.S. at 381, 86 S. Ct. at 516; a casualty of war that may result in payment from the execution of a treaty and legislation after the discharge of bankruptcy, *Williams*, 140 U.S. at 541, 11 S. Ct. at 888; the provision of overtime services to the government that may lead to payment based on post-petition legislation, *Milnor*, 41 U.S. at 227; or pre-petition harm caused by legal malpractice that may result in damages pending judicial process, *Alvarez*, 224 F.3d at 1277-78. *See also In re Dalton*, 146 B.R. 460, 463 (Bankr. D. Az. 1992) (holding that a lottery ticket purchased pre-petition that won post-petition was included in the debtor estate). Bracewell, like the debtors in *Segal*, *Williams*, *Milnor*, and *Alvarez*, was not yet entitled to his later payment when he converted his case under Chapter 7, but the crop disaster payment he received post-petition related to his pre-bankruptcy past.

The crop loss that Bracewell suffered created a contingent right to receive crop disaster relief of an unascertained value. After the crop loss, the only questions that remained were whether Congress would grant relief and whether Bracewell would fall within the purview of any legislation that Congress enacted. *See* http://disaster.fsa.usda.gov/nap.htm (listing eligibility requirements for crop disaster relief). The crop disaster legislation fixed the value that Bracewell received for his lost crops, but the earlier absence of legislation did not make Bracewell's crop loss, or contingent interest, a nullity. Nothing in the language of section 541, Supreme Court precedent, or Eleventh Circuit precedent suggests that the debtor estate only includes property with an absolute value, and I find no principled method to create a sliding scale of

contingent property interests that includes some interests in the debtor estate while excluding others.

The inclusion of crop disaster payments in the debtor estate comports with the policy of the Bankruptcy Code to prevent debtor abuse. Whether crop disaster payments are included in the debtor estate should not depend on the date of the legislative act because a debtor could exclude crop disaster payments if he chose to file his bankruptcy petition before Congress enacts legislation to grant relief. Bankruptcy policy dictates whether an interest is included in the debtor estate, *Segal*, 382 U.S. at 379, 86 S. Ct. at 515, and a debtor should not be allowed selectively to exclude property from the debtor estate by choosing the most advantageous date to file for bankruptcy. "The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession." *Whiting Pools*, 462 U.S. at 207, 103 S. Ct. at 2314-15. Other provisions of the Bankruptcy Code protect creditors' interests and prevent debtor abuse by limiting the debtor's ability to select property that will be included in the debtor estate. *See* 11 U.S.C. § 544(b)(1) (strong arm provisions); *id.* § 547 (voidable preferences); *id.* § 727 (fraudulent transfers); *cf. Yonikus*, 996 F.2d at 871 ("Debtors have an absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or are unavailable to the bankruptcy estate."). The exclusion of disaster payments from the bankrupt estate creates a windfall for the debtor at the expense of creditors contrary to the design of the Code.

I conclude that Bracewell's crop loss disaster payment is "property of the estate." 11 U.S.C. § 541(a)(1). Because Bracewell planted the crops pre-petition, lost the crops pre-petition, and legislation compensated him for that pre-petition loss, Bracewell's crop disaster payment was "rooted in the prebankruptcy past." *Segal*, 382 U.S. at 380, 86 S. Ct. at 515. I turn next to the majority's erroneous conclusion that

Bracewell's crop disaster payment was not "proceeds" of the debtor estate.

B. Bracewell's Crop Disaster Payment Is "Proceeds" of the Debtor Estate.

The majority's devotion to statutory text is nowhere to be found when the majority concludes that the crop disaster payment is not included in the debtor estate as "proceeds" despite the plain language of the Georgia version of the Uniform Commercial Code. The majority states that "[i]f the property of the estate does not include a potential future payment that the debtor is not legally entitled to receive at the time of filing, nothing in § 541(a)(6) pushes the later-acquired legal or equitable interest back into the estate." *Bracewell*, slip op. at 24. The majority concludes that "the property of his estate did not include an interest that could generate proceeds." *Id.* at 25. The majority overlooks the fact that, under state law, an expected yield is a leviable property interest and a crop disaster payment is "proceeds" of the expected yield.

Section 541(a)(6) of the Bankruptcy Code provides that the debtor estate includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate . . . ." 11 U.S.C. § 541(a)(6). Congress has stated that "proceeds" under the Bankruptcy Code is broader than under the Uniform Commercial Code. S. Rep. No. 989, 95th Cong., 2d Sess., at 83 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess., at 368 (1977); 1978 U.S.C.C.A.N. 5787. "[T]he scope of . . . Section 541(a)(6) is quite broad, [and] encompass[es] any conversion in the form of property of the estate, and anything of value generated by property of the estate." *In re Hanley*, 305 B.R. 84, 86-87 (Bankr. M.D. Fla. 2003) (citations omitted). Under section 541(a)(6), "proceeds" must come from the "property of the estate" to be included in the debtor estate.

Although "whether a debtor's interest constitutes property of the estate is a federal question," *Hall Motors, Inc. v. Lewis (In re Lewis)*, 137 F.3d 1280, 1283 (11th Cir. 1998), the majority agrees that state law governs the creation of property interests. *Bracewell*, slip op. at 26; *see Butner*, 440 U.S. at 54, 99 S. Ct. at 917-18. "Uniform treatment of property interests by both state and federal courts within a State serves . . . to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Butner*, 440 U.S. at 55, 99 S. Ct. at 918 (quoting *Lewis v. Mfrs. Nat'l Bank*, 364 U.S. 603, 609, 81 S. Ct. 347, 350 (1961)). "Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Witko*, 374 F.3d at 1043.

It is particularly appropriate to look to state law to interpret what is "proceeds" because the legislative history of section 541(a)(6) explicitly references the Uniform Commercial Code. "Proceeds here is not used in a confining sense, as defined in the Uniform Commercial Code, but is intended to be a broad term to encompass all proceeds of property of the estate." S. Rep. No. 989, 95th Cong., 2d Sess., at 83 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess., at 368 (1977); 1978 U.S.C.C.A.N. 5787. "The definition of proceeds under the UCC is much narrower than the definition of proceeds under the Bankruptcy Code." *FarmPro Servs., Inc. v. Brown (In re FarmPro Servs., Inc.)*, 276 B.R. 620, 626 (Bankr. D. N.D. 2002). If the definition of "proceeds" in the Uniform Commercial Code is "confining," *id.*, then "proceeds" as defined in Bankruptcy Code undoubtedly must be broader. Because the definition of "proceeds" in the Georgia UCC encompasses a crop disaster payment and the definition of "proceeds" in the Bankruptcy Code is broader than the UCC, crop disaster payments are *a fortiori* included in the debtor estate as "proceeds."

Georgia law defines "proceeds" as "(A) Whatever is acquired upon . . . disposition of the collateral; (B) Whatever is collected on, or distributed on account of, collateral; (C) Rights arising out of collateral; (D) To the extent of the value of the collateral, claims arising out of the loss[] . . . or damage to the collateral." O.C.G.A. § 11-9-102(a)(63). "'Collateral' means the property subject to a security interest or agricultural lien." *Id.* § 11-9-102(a)(13). Georgia broadly interprets "collateral" under the UCC to include "inchoate rights, in any and all crops to be planted, grown or produced on [the] property in the future." *Sw. Ga. Prod. Credit Ass'n v. James*, 350 S.E.2d 786, 788 (Ga. Ct. App. 1986). Under Georgia law, a crop disaster payment is the result of a "loss[] . . . or damage to" crops "to be planted, grown, or produced." O.C.G.A. § 11-9-102(a)(63)(D); *Sw. Ga. Prod. Credit Ass'n*, 350 S.E.2d at 788.

Bracewell's crop disaster payment is "proceeds" under the Georgia Uniform Commercial Code. Bracewell received the payment for "the loss of . . . or damage to" his crops. O.C.G.A. § 11-9-102(a)(63)(D). Bracewell's payment is "from property of the estate," *see* 11 U.S.C. § 541(a)(6), because the expected crop yield was a leviable and cognizable property interest under Georgia law. *See Sw. Ga. Prod. Credit Ass'n*, 350 S.E.2d at 787 (holding that a creditor's security interest in "all crops now growing or may hereafter be planted, grown or produced within seven years from the date hereof and all proceeds therefrom" granted the creditor a right to receive money from a reduced yield even though "no profit was made" (internal quotation marks omitted)). Thanks in part to the creditors seeking relief in his bankruptcy, Bracewell planted crops and, despite a lower-than-expected yield, obtained a payment for his reduced yield. The crop disaster payment "ar[ose] out of the loss of . . . or damage to" Bracewell's expected crops. O.C.G.A. § 11-9-102(a)(63)(D). If Bracewell had never planted or expected crops, he never would have received the crop disaster payment.

The majority reasons that Bracewell's payment is not proceeds "[b]ecause th[e crop disaster payment] was not given in exchange for property of the estate." *Bracewell*, slip op. at 25, but Georgia law—and consequently the Bankruptcy Code—does not limit "proceeds" to items "given in exchange for property of the estate," *id.*; Georgia law requires only that "proceeds" "aris[e] out of the loss of . . . or damage to" the crops, O.C.G.A. § 11-9-102(a)(63)(D). Proceeds "is meant to include anything that is received in consequence of the disposition of collateral." *In re Schmaling*, 783 F.2d 680, 683 (7th Cir. 1986) (quoting *In re Connelly*, 41 B.R. 217, 220 (Bankr. D. Minn. 1984)). The reliance by the majority on the congressional intent of the Agricultural Assistance Act of 2003 to characterize the payment as "assistance" to farmers, *Bracewell*, slip op. at 25, is likewise unavailing because nothing in Georgia law or the Bankruptcy Code excludes a payment meant as assistance.

The majority expressly declines to discuss decisions that have enforced security interests in crop disaster payments. Several courts have recognized the right of a creditor to acquire a security interest in crop disaster payments and collect the payment through bankruptcy. *See Schneider*, 864 F.2d at 685; *Pombo v. Ulrich (In re Munger)*, 495 F.2d 511, 513 (9th Cir. 1974); *In re Boyett*, 250 B.R. 817, 822 (Bankr. S.D. Ga. 2000); *FarmPro Servs., Inc.*, 276 B.R. at 626; *Lemos*, 243 B.R. at 101; *In re Kruse*, 35 B.R. 958, 965 (Bankr. D. Kan. 1983); *cf. Schmaling*, 783 F.2d at 683 (concluding that the security agreement in that case did not cover proceeds, but stating that government entitlements are proceeds where crops were actually planted). Courts have also concluded that creditors have a right to proceeds from government programs when the debtor plants crops that never materialize, although the debtor did not participate in the government program when the creditor established the security interest. *See Kruse*, 35 B.R. at 965.

The conclusion of the majority leads to an absurd result. The exclusion of the payment as proceeds of the debtor estate violates the fundamental tenet of bankruptcy law to preserve the security interests of creditors within bankruptcy. "The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession." *Whiting Pools*, 462 U.S. at 207, 103 S. Ct. at 2314-15. "[T]he protections afforded secured creditors under the Code generally adhere first to the principle that the secured creditor is entitled to priority payment out of its collateral, and second to the principle that the secured creditor is entitled to receive the equivalent value of its collateral." Colliers on Bankruptcy ¶ 506.02 (15th ed. rev. 2006).

Under the majority's view, a debtor can effectively void a valid security interest held by a creditor by filing a bankruptcy petition. Outside of bankruptcy, under the definition of "proceeds" in Georgia law, a creditor with a security interest in the proceeds of a debtor's crop would be able to recover any crop disaster payment the debtor receives. *See* O.C.G.A. § 11-9-102(a)(63); *cf. Sw. Ga. Prod. Credit Ass'n*, 350 S.E.2d at 787. Within bankruptcy, the same creditor would be unable to benefit from the crop disaster payment because the payment is not included in the debtor estate. The conclusion of the majority creates "a windfall merely by reason of the happenstance of bankruptcy." *Lewis*, 364 U.S. at 609, 81 S. Ct. at 350. According to the majority, because Bracewell decided to convert under Chapter 7 before the enactment of the legislation granting him relief, Bracewell both discharged his pre-bankruptcy debts to his creditors who provided capital for Bracewell's pre-bankruptcy crops and voided any security interests in the proceeds of the crops that the creditors otherwise might have enforced. Although the majority cautions that we should not seek to improve a statute under the guise of interpreting it, *see Bracewell*, slip op. at 12-14, nothing in the statutory text requires us to interpret "proceeds" in a way that is "so bizarre that Congress could

not have intended it." *Demarest v. Manspeaker*, 498 U.S. 184, 190-91, 111 S. Ct. 599, 604 (1991).

To reach the conclusion that crop disaster payments are not proceeds of the debtor estate, the majority must ignore the text of the Georgia Code, the legislative history of the Bankruptcy Code, and the fundamental policy goals of secured transactions and bankruptcy. Under the guise of interpreting section 541(a)(6), the majority voids valid rights granted to creditors by Georgia law. *See Bracewell*, slip op. at 12-14. I must disagree with that conclusion.

Because I would reverse the decision of the district court, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

In re:	:	
	:	
RICKY W. BRACEWELL,	:	
	:	
Debtor.	:	
	:	
RICKY W. BRACEWELL,	:	
	:	Bankruptcy Appeal
Appellant,	:	Civil Action No.
	:	6:04-CV-33 (HL)
v.	:	
	:	
WALTER W. KELLY, TRUSTEE,	:	
	:	
Appellee.	:	

ORDER

Before this Court is an appeal from the United States Bankruptcy Court for the Middle District of Georgia brought by Ricky W. Bracewell. The bankruptcy court held that a crop disaster payment, created by federal legislation enacted after Appellant converted his Chapter 12 case to a Chapter 7 case, qualified as property of the estate under 11 U.S.C.A. § 541(a)(1) (West 2004), but not under § 541(a)(6). For the reasons set forth below, the bankruptcy court's decision is reversed in part and affirmed in part.

I. JURISDICTION and STANDARD OF REVIEW

Under 28 U.S.C.A. § 158(a)(1), this Court has jurisdiction to hear a final judgment, order, or decree from a United States Bankruptcy Court. 28 U.S.C.A. § 158(a)(1) (West 1993 & Supp. 2004); *see* Fed. R. Bankr. P. 8001. The bankruptcy court's order was final within the meaning of § 158(a)(1); thus, this Court has jurisdiction to hear this appeal.

When adjudicating an appeal from a bankruptcy court, federal district courts are empowered to "affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree" and will accept the bankruptcy court's factual findings unless those findings are clearly erroneous. Fed. R. Bankr. P. 8013; *see Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381, 1383 (11th Cir. 1990); *see also Club Assocs. v. Consol. Capital Realty Investors (In re Club Assocs.)*, 951 F.2d 1223, 1228 (11th Cir. 1992). A district court is not empowered to make independent findings of fact. *In re Sublett*, 895 F.2d at 1384. Moreover, if a bankruptcy court's findings are "silent or ambiguous as to an outcome determinative factual question," remand to the bankruptcy court is required. *Id.* (quoting *Wegner v. Grunewaldt*, 821 F.2d 1317, 1320 (8th Cir. 1987)).

In contrast to factual findings, conclusions of law, including a bankruptcy court's interpretation and application of the Bankruptcy Code ("the Code"), are reviewed *de novo*. *See Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.)*, 904 F.2d 588, 593 (11th Cir. 1990). Whether property constitutes property of the bankruptcy estate is a legal issue to be reviewed *de novo*. *Witko v. Menotte (In re Witko)*, 374 F.3d 1040 (11th Cir. 2004) (citing *Bell-Tel Fed. Credit Union v. Kalter (In re Kalter)*, 292 F.3d 1350, 1352 (11th Cir. 2002)).

II. ISSUES ON APPEAL

This Court must first determine the precise issue being appealed. Federal Rule of Bankruptcy Procedure 8006

provides, "[T]he appellant shall file with the clerk and serve on the appellee . . . a statement of the issues to be presented. . . . [I]f the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal." Fed. R. Bankr. P. 8006. "An issue that is not listed pursuant to [Rule 8006] *and* is not inferable from the issues that are listed is deemed waived and will not be considered on appeal." *Snap-On Tools, Inc. v. Freeman (In re Freeman)*, 956 F.2d 252, 255 (11th Cir. 1992) (emphasis added). Thus, as long as an issue is inferable, then Rule 8006 "is not intended to bind either party to the appeal as to the issues that are to be presented." *In re Cohoes Indus. Terminal, Inc.*, 90 B.R. 67, 70 (S.D.N.Y. 1988) (internal quotation marks omitted).

The Eleventh Circuit has not set forth a test for determining when an issue is inferable. Therefore, adopting a mix of approaches from other courts, this Court holds that an issue not listed in a Rule 8006 Issue Statement is inferable under the following circumstances. First, the issue must have been raised in the bankruptcy court because an appellate court generally will not consider issues not adjudicated below. *Harrison v. Brent Towing Co., Inc. (In re H & S Transp. Co., Inc.)*, 110 B.R. 827, 830 (M.D. Tenn. 1990) (citing *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)). Second, and in conjunction with the previous point, the issue must not require the court to make any independent factual findings. *In re H & S Transp. Co.*, 110 B.R. at 830. Third, the issue must present no surprise to the other litigant. *See Turner v. Marshack (In re Turner)*, 186 B.R. 108, 117 (B.A.P. 9th Cir. 1995).

Here, Appellant identifies the issue as whether a federal crop disaster payment is property of the estate under 11 U.S.C.A. § 541(a)(1). Appellee, however, contends the issue is whether the payment is property of the estate under § 541(a)(1) and § 541(a)(6). Appellant argues that the § 541(a)(6) component of the issue is not listed in Appellant's

Rule 8006 Issue Statement. Further, Appellant asserts that Appellee neither filed a cross-appeal on the § 541(a)(6) issue, nor objected to or moved to supplement, to the extent it is possible, Appellant's Rule 8006 Issue Statement.

This Court's review of the record reveals that Appellant is correct regarding both assertions. However, the Court will consider the § 541(a)(6) issue because the issue is inferable from the filings. First, the bankruptcy court adjudicated the § 541(a)(6) issue; thus, it is not being raised on appeal for the first time. Second, the § 541(a)(6) issue does not require this Court to make any independent factual findings. Third, Appellant was not taken by surprise by the issue. In fact, Appellee argued the issue in his Response Brief, and Appellee addressed it in his Reply Brief. Therefore, the issue presented in this appeal is whether Appellant's crop disaster payment is property of Appellant's bankruptcy estate under § 541(a)(1) or § 541(a)(6) when the payment was created by federal legislation after Appellant filed for bankruptcy, specifically after he converted his Chapter 12 bankruptcy case to a Chapter 7 bankruptcy case.

III. FACTS and PROCEDURAL HISTORY

The parties stipulated, and the bankruptcy court adopted, the following facts. Appellant planted approximately 223 acres of seed wheat in November 2000 and approximately 374 acres of seed cotton in May 2001. Appellant used regular farming practices to grow the crops to harvest. During 2001 Appellant's crops were plagued by drought, causing reduced harvest yields. Due to the reduced yields, Appellant was unable to pay for the farm-related debt he incurred to produce the crops. Appellant filed a Chapter 12 bankruptcy petition on May 29, 2002, and he converted it to a Chapter 7 case on January 2, 2003.

The Agricultural Assistance Act of 2003 (the "Act") was signed into law on February 20, 2003. The Act provided assistance to farmers who suffered losses due to weather-

related disasters or other emergency conditions which affected their 2001 or 2002 crops. The farmers were allowed to select either the 2001 or 2002 crops as the basis for determining their disaster payment. Appellant applied on January 30, 2004 for a disaster payment from the United States Department of Agriculture Farm Service Agency in the amount of $41,566 for the losses Appellant incurred on his 2001 crops.

In the proceedings below, Appellee filed a motion to determine whether the crop disaster payment was property of the Chapter 7 bankruptcy estate. The bankruptcy court rejected Appellee's argument that the payment constituted "proceeds" of estate property under 11 U.S.C.A. § 541(a)(6). The bankruptcy court did hold, however, that the payments were property of the estate under 11 U.S.C.A. § 541(a)(1). Appellant filed a timely notice of appeal.

IV. ANALYSIS

In analyzing the issues in this case, the Court shall first focus on property of the estate under § 541(a)(1) before turning to § 541(a)(6) and whether the decisions reached in this Order are unfair to creditors.

A. Property of the Estate under § 541(a)(1)

Section 541(a)(1) of the Code provides that a debtor's bankruptcy estate is comprised of "[a]ll legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C.A. § 541(a)(1).[1] Section 541(a)(1)'s

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[1] Although federal law defines what interests of a debtor are transferred to the estate, federal law does not generally address the threshold question of the existence and scope of a debtor's interests. *See In re Witko*, 374 F.3d at 1043. This is because the existence and scope of a debtor's interest are typically defined by state law. *Id.*; *see Butner v. United States*, 440 U.S. 48, 54 (1979). But state law definitions do not come into play when "some federal interest requires a different result." *Butner*, 440 U.S. at 55. Here, the Appellant's property interest was created by federal law. Therefore, since the crop disaster payments are a creature of federal law, federal law shall apply. *See Drewes v. Vote (In re Vote)*, 261 B.R. 439,

broad scope "'includes property of all types, tangible and intangible, as well as causes of actions.'" *Meehan v. Wallace (In re Meehan)*,102 F.3d 1209, 1210 (11th Cir. 1997) (quoting *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, n.9 (1983)). Moreover, "an interest is not outside [§ 541(a)(1)'s] reach because it is novel or contingent." *Segal*, 382 U.S. at 379. Nevertheless, § 541(a)(1)'s wide reach must be balanced by its temporal limitation to the commencement of the case. *In re Vote*, 261 B.R. at 442. Striking the balance between § 541(a)(1)'s wide reach and its temporal limitation lies at the heart of this case.

While neither the Supreme Court nor the Eleventh Circuit have had to strike this balance in the context of federal crop disaster payments, cases addressing this balance do arise in other contexts. To illustrate, in *Segal*, decided under the former Bankruptcy Act, the Supreme Court held that claims for loss-carryback tax refunds were bankruptcy estate property because, in part, they were sufficiently rooted to the debtor's pre-bankruptcy past. 382 U.S. at 380. This was because the predicates for receiving the refunds (payment of taxes in prior years and a net operating loss) occurred pre-petition, even though the *Segal* debtor could not claim the refunds until the tax year closed. *In re Witko*, 374 F.3d at 1043 (discussing *Segal*). Thus, "[t]he debtor had more than a hope that his losses might generate revenue in the future; he 'possessed an existing interest at the time of filing [his bankruptcy petition].'" *Id.* (interpreting *Segal*, quoting *In re Vote*, 276 F.3d at 1026, and citing *Sliney v. Battley (In re Schmitz)*, 270 F.3d 1254, 1258 (9th Cir. 2001)).

While *Segal* does not specifically address the issue, it seems as though the tax laws providing for the loss-carryback

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441-44 (B.A.P. 8th Cir. 2001) (using federal law to determine the existence and scope of debtor's interest in federally created crop disaster relief payment); *Cf. Segal v. Rochelle*, 382 U.S. 375, 379 (1966) (using federal law to determine the existence and scope of debtor's interest in a federally created tax refund).

tax refunds had been enacted prior to the *Segal* debtor filing his bankruptcy petition. *See* 26 U.S.C.A. § 172 (West 2002) (listing historical and statutory notes). This assumption underscores the fact that, "[t]he Supreme Court did not allow the *Segal* trustee to assert more rights than the debtor had at the commencement of the case; it merely allowed the trustee to seek the interests existing, though still undetermined in quantity, at the time the debtor filed his petition." *In re Witko*, 374 F.3d at 1043 (interpreting *Segal*). Thus, even though *Segal* teaches that § 541' s scope is broad, it also teaches that § 541's reach is not without limits. *See id.* at 1042-43 (interpreting *Segal*); *see also In re Vote*, 261 B.R. at 442 (same).

In the context of a legal malpractice claim, the Eleventh Circuit also struck the balance between § 541(a)'s wide reach and its temporal limitation in *In re Witko*. 374 F.3d at 1043. The *In re Witko* petitioner filed a petition for voluntary bankruptcy and afterwards claimed that he had suffered harm due to his attorney's alleged malpractice in another proceeding. *Id.* at 1042. Applying Florida law to the malpractice claim, the *In re Witko* court reasoned that the claim was not bankruptcy estate property. *Id.* at 1044. Instead of finding the claim to be contingent, the *In re Witko* court found that the claim simply did not exist when the debtor filed for bankruptcy because it had not accrued under Florida law. *Id.* Thus, in *In re Witko* the Eleventh Circuit seems to instruct that having an interest sufficiently rooted in the pre-bankruptcy past is not enough under *Segal* to qualify as property of the estate. Rather, it must be coupled with some sort of "existing interest at the time of filing" to qualify as estate property. *Id.* at 1043 (internal quotation marks omitted).

Bankruptcy courts have used *Segal* to find that crop disaster payments, created by legislation enacted pre-petition *and* post-petition, were property of the estate. *Compare Boyett v. Moore (In re Boyett)*, 250 B.R. 817 (Bankr. S.D. Ga.

2000) (holding that a crop disaster payment created by legislation enacted pre-petition was property of the estate); *with Lemos v. Rakozy (In re Lemos)*, 243 B.R. 96 (Bankr. D. Idaho 1999) (holding that crop disaster payments created by legislation enacted post-petition were property of the estate). However, these cases do not seem to stand for the proposition that the date the crop disaster legislation was enacted the decisive factor. *Burgess v. Sikes (In re Burgess)*, 392 F.3d 782, 785 (5th Cir. 2004), *reh'g en banc granted*, No. 04-30189, 2005 WL 600279 (5th Cir. March 9, 2005) (interpreting *In re Lemos* and *In re Boyett*). Rather, these cases seem to hold that the crop disaster payments were property of the estate because the payments covered crop losses the farmers had incurred before they filed for bankruptcy, making the payments sufficiently rooted to the debtor farmers' pre-bankruptcy pasts. *Id.* In light of the broad reading the Supreme Court has given to § 541(a)(1), such holdings are a plausible approach – but not the only approach.

For example, the Bankruptcy Appellate Panel for the United States Court of Appeals for the Eighth Circuit determined that crop disaster payments generated under a crop disaster statute enacted after the debtor filed his Chapter 7 petition were not property of the estate under § 541(a)(1). *In re Vote*, 261 B.R. at 440. First, *In re Vote* reasoned that *Segal* and its subsequent line of cases may be questionable authority when dealing with crop disaster payments. *Id.* at 442. In analyzing the Code's legislative history, *In re Vote* suggested that *Segal*'s holding may be viable only to the extent that it applies to tax refunds that are received or will be received post-petition. *Id.* at 443. Indeed, the congressional records for the United States Senate and the House of Representatives state, "'The result of *Segal v. Rochelle*, . . . is followed, *and the right to a refund is property of the estate.*'" *Id.* (quoting S. Rep. No. 95-989, at 82, reprinted in 1978 U.S.C.C.A.N. 5787, 5868; H.R. Rep. No. 95-595, at 367, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323) (emphasis).

Citing the same legislative history, however, the Eleventh Circuit emphasized that *Segal* had continuing vitality for tax refunds in general, not just loss-carryback tax refunds. *Doan v. Hudgins (In re Doan)*, 672 F.2d 831, 833 (11th Cir. 1982). Indeed, the Eleventh Circuit has cited *Segal* with approval outside the tax refund context since the Code came into effect. *In re Witko*, 374 F.3d at 1043 (discussing *Segal* to determine whether a legal malpractice claim was bankruptcy estate property); *Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (In re Alvarez)*, 224 F.3d 1273, 1289 (11th Cir. 2000) (same). Thus, even though *Segal* may be questionable in the Eighth Circuit, it remains an applicable analytical tool in the Eleventh Circuit.

Nevertheless, even under *Segal*'s approach, *In re Vote* held that the crop disaster payments did not fall under § 541(a)(1). 261 B.R. at 444. *In re Vote* reasoned:

> As of the date the Debtor filed his bankruptcy petition, he may have had, at most, an expectation that Congress would enact legislation authorizing crop disaster payments to farmers affected by the weather conditions in 1999, but there was no assurance that Congress would authorize such payments or that the Debtor would qualify for them if they were authorized. It was equally likely that Congress would *not* pass such relief legislation. Such an expectancy (or "hope" . . .) does not rise to the level of a "legal or equitable interest" in property of the estate under 11 U.S.C. § 541(a)(1).

Id.

The United States Court of Appeals for the Fifth Circuit also addressed *Segal* in the context of crop disaster payments in *Burgess v. Sikes (In re Burgess)*, 392 F.3d 782 (5th Cir. 2004), *reh'g en banc granted*, No. 04-30189, 2005 WL 600279 (5th Cir. March 9, 2005). In *In re Burgess*, the legislation providing for the crop disaster payment did not

exist at the time the debtor filed for bankruptcy. *Id.* at 784. Finding *Vote* persuasive, *Burgess* reasoned that at the time the debtor filed for bankruptcy, he had only a mere hope that future legislation would provide relief for his crop loss. *Id.* at 786. Although Congress frequently and regularly enacts such legislation, *Burgess* noted, the debtor had no way of knowing whether legislation covering his crop loss would be enacted. *Id.* Thus, the debtor had no legal or equitable right to such a payment at the commencement of his case absent such legislation. *Id.*

An case decided in 1999 that is factually similar to this case, however, reached the opposite conclusion than the two more recently decided cases that were cited above. *In re Lemos* dealt with whether crop disaster payments were estate property when they were created by legislation enacted after the debtors filed for Chapter 12 relief and after the debtors converted their Chapter 12 case to a Chapter 7 case.[2] 243 B.R. at 97-101. Relying on *Segal*, *In re Lemos* reasoned that the debtor's entitlement to the payments were the result of qualifying events, growing and suffering certain crop losses, rather than any significant event taking place after filing his bankruptcy. *Id.* at 98. The *Lemos* court noted the following:

> Congress frequently and regularly enacts a variety of farm subsidy programs . . . which change from year to year. The prospect of a federal program being adopted to compensate for farm losses in any given year may therefore be properly characterized as a contingent interest, which, though it may never vest if the program does not encompass a particular crop or a particular year, is property of the estate when it relates to prepetition crops.

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[2] *In re Lemos* decided that crop disaster payments qualified as property of the estate under § 541(a)(1) and § 541(a)(6). 243 B.R. at 98-101. The Court addresses *In re Lemos*' analysis of the § 541(a)(1) issue in this section and addresses *In re Lemos*' analysis of the § 541(a)(6) issue in Section IV, B of this Order.

Id.

In re Lemos is not persuasive for several reasons. First, *In re Lemos* relied on *Battley v. Schmitz (In re Schmitz)*, 224 B.R. 117 (Bankr. D. Alaska 1998), which was later supplemented by the district court, affirmed Bankruptcy Appellate Panel for the Ninth Circuit, but ultimately reversed by the Ninth Circuit, in *Sliney v. Battley, (In re Schmitz)*, 270 F.3d 1254 (9th Cir. 2001). Second, the court's reasoning in *In re Lemos*' was criticized as being outdated by *In re Stallings*, 290 B.R. 777, 781 (Bankr. D. Idaho 2003). Bankruptcy Judge Jim D. Pappas, who spoke for the court in *In re Lemos*, also spoke for the court in *In re Stallings*. 290 B.R. at 781. Upon reviewing his prior decision in *In re Lemos*, Judge Pappas determined that the law had changed since *In re Lemos* had been decided. *Id.* Consequently, the *In re Stallings* court held that under 11 U.S.C.A. § 541(a)(1) and § 541 (a)(6), crop disaster payments received from legislation enacted after the filing of a bankruptcy petition were not property of the estate. 290 B.R. at 781-84.

Third, the court's reasoning in *In re Lemos* improperly conflates two concepts, specifically the contingency of receiving crop disaster payments once authorizing legislation is enacted, and the mere hope that such legislation will be enacted in the first place. The *In re Lemos* court, in the same sentence, confuses the enactment of federal disaster relief legislation with the factors that would qualify one for such relief. 243 B.R. at 99 ("The prospect of a federal program being adopted to compensate for farm losses . . . may . . . be . . . characterized as a contingent interest, which, though it may never vest if the program does not encompass a particular crop or a particular year, is property of the estate when . . . related to prepetition crops.").

On one hand, the Court agrees that crop disaster relief entitlements are contingent once the authorizing legislation is enacted. This is because once the authorizing legislation is enacted, a farmer not only must meet the congressionally

mandated requirements to qualify but also must go through the administrative avenues, although largely ministerial, to obtain the payment. Thus, once crop disaster legislation is enacted, legally significant facts exist upon which a farmer could base a contingent right, which is the same type of contingent right contemplated under *Segal*.

On the other hand, the mere hope that crop disaster legislation will be enacted to create the contingent interest discussed immediately above is a different concept. Without the crop disaster legislation, growing crops and suffering crop loss – no matter how sufficiently rooted to the pre-bankruptcy past – are of no legal significance and create no right. This is why the bankruptcy court's statement, "Upon the occurrence of the disaster, [Appellant] had the right to collect disaster payments from the government, if such legislation [were] passed,"[3] employs circular reasoning. Indeed, it is the crop disaster legislation that makes growing and suffering certain crop losses relevant by attaching new legal consequences to events completed before the legislation's enactment.[4] Consequently, this is not the type of contingency contemplated by *Segal* and, moreover, not the type of contingency that is tied to an "existing interest at the time of filing" as is contemplated in *In re Witko*.

Appellee missed this crucial distinction. For example, Appellee argued that *In re Witko*'s reasoning can be

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[3] This statement, in the bankruptcy court's brief conclusions of law section, seems to encapsulate the bankruptcy court's reasoning for its § 541(a)(1) holding.

[4] Conflating the concepts of the true contingency of receiving crop disaster payments once authorizing legislation is enacted, and the mere hope that such legislation will be enacted in the first place, also plagues the scant academic discussion of this issue. *See generally* Tamara D. Wells, Note, *The Eighth Circuit Contradicts a Purpose of Bankruptcy by Excluding Crop Loss Disaster Payments from the Bankruptcy Estate in In re Vote*, 36 Creighton L. Rev. 315, 341-52 (2003) (improperly arguing that crop disaster relief payments are contingent and analogizing such payments to true contingent interests, such as tax refunds).

distinguished from the case under consideration here. Appellee stated that this case involves a crop disaster payment made on account of pre-petition crops, which is not like the malpractice claim in *In re Witko* that, by law, did not exist until post-petition. Unlike the malpractice claim, Appellee asserted, Appellant's crops did exist before the bankruptcy case was filed, and the crop losses had occurred before the bankruptcy case was filed. Appellee forgot, however, that just as the *In re Witko* debtor's claim did not exist until post-petition because it had not accrued, Appellant's right to the crop disaster payment did not exist until post-petition because the legislation making his crop loss legally relevant and significant did not exist until post-petition and post-conversion.

Appellee also missed the distinction when he argued that a lottery ticket is analogous to a crop loss and that the subsequent lottery drawing is analogous to the subsequent enactment of the crop disaster legislation. It is true that lottery winnings stemming from a ticket purchased pre-petition, where the drawing was held post-petition, have been held to be estate property. *Sirek v. Dalton (In re Dalton)*, 146 B.R. 460, 461 (Bankr. D. Az. 1992). But it is not true that crop losses are analogous to such a ticket.

A lottery ticket purchased pre-petition gives the ticket holder an existing contractual right to payments should certain contingencies occur. *See, e.g., Brown v. Brown (In re Brown)*, 82 B.R. 967, 968 (Bankr. N.D. Ind. 1988) ("Lottery winnings are unlike future wages, which are not property of a Chapter 7 bankruptcy estate, because Debtor has a present contractual right to receive future lottery payments, whereas he must earn future wages."). Therefore, while the lottery ticket memorializes a pre-existing contract that makes subsequent events, for instance the drawing of certain numbers, relevant and legally significant, it is the crop disaster legislation that makes growing crops and suffering certain crop losses relevant by attaching new legal

consequences to events completed before the legislation's enactment. Thus, a better analogy to a lottery ticket would be the crop disaster relief legislation. Even this analogy, however, is imperfect. The contingent contractual right a lottery ticket affords is premised on events that might occur in the future; it is prospective. The contingent right created by the federal crop disaster legislation at issue here is based on events that have already occurred; it is retrospective. Thus, it is the post-petition enactment of crop disaster legislation coupled with the retroactive nature of crop disaster payments that make the payments difficult to categorize and analogize with other types of property interests.

The Court finds the reasoning of *In re Vote* and *In re Burgess* persuasive and finds that their reasoning is consonant with this circuit's interpretation of *Segal*. Therefore, the bankruptcy court's holding that a crop disaster payment, created by legislation enacted after Appellant filed for bankruptcy under Chapter 12 and after Appellant converted his case to one under Chapter 7, is property of the estate under § 541(a)(1) is reversed.

B. Proceeds of Property of the Estate under § 541(a)(6)

Section 541(a)(6) states that property of the estate includes "proceeds . . . of property of the estate." 11 U.S.C.A § 541(a)(6). Read together with § 541(a)(1), "proceeds" under § 541(a)(6) must derive from property of the estate, which is a legal or equitable interest of the debtor in property at the commencement of the case. *In re Burgess*, 392 F.3d at 787. Under this reasoning, the *In re Burgess* court emphasized that the debtor had no legal or equitable interest in property as of the commencement of the case that could mature into the crop disaster payment. *Id.* Consequently, § 541(a)(6), and its reference to proceeds, could not retroactively create a property interest that did not exist at the commencement of the case. *Id.*

Here, in a short paragraph, the bankruptcy court held that the crop disaster payment was not proceeds of property of the estate. This holding seemed to be premised on the assumption that since no crops existed when Appellant filed for bankruptcy, there could be no proceeds. Appellee, however, urges this Court to hold otherwise. Appellee argued that several cases dictate a finding that the crop disaster payment should be characterized as proceeds under § 541(a)(6). First, Appellee cites *White v. United States (In re White)*, No. BRL88-00971C, 1989 WL 146417 (Bankr. N.D. Iowa Oct. 27, 1989), for support. *In re White* was a Chapter 12 case in which the disaster payment legislation was enacted two months after the debtor filed his Chapter 12 petition. *Id.* at *1. The *In re White* court held that one of the two payments the debtor received under the legislation was property of the estate under § 541(a)(6) and that factual issues precluded it from ruling on the other payment. *Id.* at *2-7. Regarding the first payment, the court held that the crop disaster payments were "proceeds" of property of the estate by virtue of 11 U.S.C.A. § 1207. *Id.* at *4.

Section 1207 states, in part:

> Property of the estate includes, in addition to the property specified in section 541 of this title . . . all property of the kind specified in such section that the debtor acquires after the commencement of the case *but before the case is closed, dismissed, or converted to a case under chapter 7 of this title*, whichever occurs first."

11 U.S.C.A. § 1207(a)(1) (West 2004) (emphasis added). Unlike in Chapter 7 cases, in Chapter 12 cases § 1207 can expand property of the estate by including entitlements from crop disaster statutes enacted post-petition. *See id.*; *see also In re White*, No. BRL88-00971C, 1989 WL 146417 at *4. Thus, it was § 1207 that brought the crop disaster entitlement into the bankruptcy estate as proceeds in *In re White*. Here, because Appellant's conversion to Chapter 7 in this case cut

off § 1207's applicability, *In re White* does not offer strong support for Appellee's position.

Second, Appellee cites *In re Lemos* for support. The *In re Lemos* court's reasoning, in holding that crop disaster payments created by legislation enacted after filing a Chapter 12 case and after converting it to a Chapter 7 case are proceeds of property of the estate under § 541(a)(6), is outdated. *In re Stallings*, 290 B.R. at 783. Further, *In re Lemos* relies on *In re White*, which, as the above paragraph points out, is properly interpreted as relying heavily on § 1207, and §1207 does not apply in this case because the crop disaster legislation was enacted post-conversion. Additionally, *In re Lemos* relies on *Kelley v. Ring (In re Ring)*, 169 B.R. 73 (Bankr. M.D. Ga. 1993) *aff'd* 160 B.R. 692 (M.D. Ga 1993). *In re Ring*, held that a crop disaster payment created by legislation prior to the date the debtor filed for bankruptcy was "proceeds" of property of the estate under § 541(a)(6). 169 B.R. at 74. Thus, the court's holding in *In re Ring* can be read to support the reasoning set forth in this Order, which focuses on when the legislation created the entitlement. Thus, to the extent that an entitlement to crop disaster payment can be property of the estate when the authorizing legislation is enacted pre-petition or pre-conversion, then a payment from that entitlement can qualify as proceeds.

Further, *In re Ring* analogized the crop disaster benefits to insurance payments. *Id.* at 76. This analogy only makes sense if the disaster relief legislation were enacted pre-petition. This is so because a crop insurance policy on a pre-petition crop would have been issued pre-petition. Consequently, the contingent right to enforce the insurance policy in the event of crop loss would have existed pre-petition and would have constituted property of the estate together with the crop itself. Thus, the post-petition payment for a loss covered by the policy is easily viewed as proceeds

of the pre-petition crop by virtue of the pre-petition policy entitlement.

Similarly, the combination of a pre-petition/pre-conversion disaster payment statute and crop loss would entitle the debtor to receive a crop disaster payment. This entitlement is a pre-existing contingent right that is property of the estate even if the payment cannot be applied for or received until after the debtor files his or her bankruptcy petition, as was the case in *In re Ring*. Thus, the disaster payment, regardless of when it is actually paid, is the proceeds of the pre-petition entitlement. Without the statute, there would have been no entitlement, and without the entitlement, there would have been no proceeds. Therefore, because *In Re Ring* dealt with legislation creating crop disaster relief that was enacted pre-petition, it does not bolster *In re Lemos* or, consequently, Appellee's argument.

Third, Appellee cites *FarmPro Services Inc. v. Brown (In re FarmPro Services, Inc.)*, 276 B.R. 620 (D.N.D. 2002), for support. *Id.* at 622. Although the opinion is not clear on this point, it appears as though this petition was dismissed. Subsequently, the debtors filed a Chapter 13 petition on September 29, 2000. *Id.* at 623. On October 28, 2000, Congress enacted crop disaster payment legislation providing benefits for the 2000 crop year. *Id.* The debtors converted their Chapter 13 case to a Chapter 11 case on December 29, 2000. *Id.* On June 4, 2001, they converted the Chapter 11 case to a Chapter 12 case.

Relying on *In re Lemos*, the *In re FarmPro* court found that the crop disaster payments were proceeds of property of the estate under § 541(a)(6). *Id.* at 624. The debtors argued that *In re Lemos* did not apply because in that case the right to payments arose pre-petition; whereas, in their case the right to payment arose post-petition. It appears to this Court, however, that the debtors did not read *In re Lemos* carefully, as in that case, the right to payment arose post-petition. 243 B.R. at 97. In contrast, the right to payment in *In re FarmPro*

arose after the debtors filed their Chapter 13 petition but before they converted to a Chapter 11 case and then to a Chapter 12 case. 276 B.R. at 623. Nevertheless, the *In re FarmPro* court found the distinction to be irrelevant. *Id.* at 624. The court reasoned that *In re Lemos* provided the correct reasoning. *Id.* To the extent that this Court finds *In re Lemos*' reasoning unpersuasive as discussed earlier in this opinion, it finds *In re FarmPro*'s reliance on *In re Lemos* unconvincing.

Even so, *In re FarmPro* can be read as reaching the correct result for the wrong reasons. The disaster relief legislation at issue in *In re FarmPro* was enacted after the debtors filed their Chapter 13 petition but before they converted to a Chapter 11 case and then to a Chapter 12 case. 276 B.R.at 623. Thus, the payments, as proceeds of that right, were received while the debtors were in a Chapter 12 case. Thus, *In re White*, – not *In re Lemos* – is the appropriate authority for *In re FarmPro*, which failed to recognize that the Code treats Chapter 12 cases and Chapter 7 cases differently. In light of this interpretation, Appellee's argument as it relates to *In re FarmPro* is unavailing.

Therefore, the Court affirms the result of the bankruptcy court's holding regarding § 541(a)(6); the crop disaster payment here cannot be characterized as "proceeds" of property of the estate.

C. The Possibility of Unfair Results to Creditors

This Court is aware that its legal conclusions may frustrate the efforts of creditors trying to collect on debts owed to them. For example, Appellee argues that using the enactment date of the crop disaster relief legislation produces absurd results. Similarly, Appellee and the Bankruptcy Court noted that it would be unfair to allow Appellant to retain the crop disaster payment because Congress could not have intended to give Appellant a windfall to avoid paying the creditors whose extension of credit funded the subject crops.

This Court agrees that a windfall would be unfair. However, a windfall to debtors will not always occur.

To illustrate, § 1207, as discussed above, may provide some relief to creditors. This is because, unlike in Chapter 7 cases, in Chapter 12 cases § 1207 can expand property of the estate by including entitlements from crop disaster statutes enacted post-petition. 11 U.S.C.A. § 1207(a); *see In re White*, No. BRL88-00971C, 1989 WL 146417, at *1. Here, however, Appellant converted his Chapter 12 case to one under Chapter 7 before the legislation creating the crop disaster entitlement was enacted; thus, the provisions of § 1207 do not come into play.

Additionally, Appellee argues that the Court's ruling will encourage manipulation of the Code. If, however, a court determines that a debtor has abused the bankruptcy process by converting his Chapter 12 case to a Chapter 7 case to keep crop disaster payments from the reach of creditors, § 105 may provide a solution. Section 105(a) states the following:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11. U.S.C.A. § 105(a) (West 2004). It would be rather easy to track a bill in Congress dealing with crop disaster relief, and, in an effort to receive a windfall, one could perhaps time a bankruptcy petition or conversion in the hopes that such legislation would be enacted. Here, however, the bankruptcy court made no findings on whether Appellant converted his case from a Chapter 12 to a Chapter 7 to prevent future crop disaster payments from becoming property of the estate or

whether such conduct would amount to bad faith and manipulation of the Code. Further, the Court declines to opine on what possible options § 105(a) would confer on the bankruptcy court should it make such findings.

Another avenue to prevent windfalls could involve creditors attempting to take and perfect security interests in the farmer's future payments from crop disaster entitlement programs. Hon. John K. Pearson, *Revised Article 9 and Government Entitlement Program Payments: A Suggested Solution to Classification Confusion*, 22-Oct. Am. Bankr. Inst. J. 24, 24 (2003). The revised Article 9 of the Uniform Commercial Code, however, provides little help to a lender attempting to create a security interest in a borrower's government entitlement program. *Id.* Therefore, lenders are left to untangle the conflicting pre-revision case on the issue and to sort out how the revised Article 9 and the current federal farm legislation fit into that historical framework. *Id.* Here, the bankruptcy court did not make findings regarding this issue.

Even with the availability to curb potential windfalls, unfairness will be the unfortunate result in some cases. But the unfairness is largely due to the nature of federally created crop disaster payments, which are in the form of congressionally created retrospective relief. Since this relief – and the possibility of a concomitant windfall to debtors – is a creation of Congress, it should be Congress who must remedy the situation, not the courts by judicial fiat. Congress was well aware of what it was creating when it enacted the crop disaster relief legislation. Congress could have crafted the crop disaster legislation in such a way that encompassed the rights of creditors. It did not. Congress could have added a provision to the Code that specifically classified retrospective government entitlements with regard to property of the estate. It did not. Perhaps it should.

V. CONCLUSION

The Bankruptcy Court is reversed in part and affirmed in part. Its holding that the crop disaster payment in this case was property of the estate under § 541(a)(1) is reversed. Its holding that the crop disaster payment in this case was not property of the estate under § 541(a)(6) is affirmed.

SO ORDERED, this the 30th day of March, 2005.

/s/ Hugh Lawson
HUGH LAWSON, Judge

jmb

APPENDIX C

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

IN RE:	:	
	:	
RICKY W. BRACEWELL,	:	CASE NO. 02-60546
Debtor.	:	CHAPTER 7
	:	
	:	
WALTER W. KELLEY,	:	CONTESTED
Movant,	:	MATTER
	:	
vs.	:	
	:	
RICKY W. BRACEWELL,	:	
Respondent	:	
	:	

INTRODUCTION

On April 5, 2004, Chapter 7 Trustee Walter W. Kelley ("Movant") filed a Motion to Determine Whether Crop Disaster Payment is Property of the Estate ("Motion") in the above captioned bankruptcy case of Ricky W. Bracewell ("Respondent"), along with a Stipulation of Facts and a brief memorandum in support his Motion. At the parties' request, no hearing was scheduled. Upon Respondent's brief and Movant's reply brief being filed with the Court, the Court took the matter under advisement. The Court has considered the stipulated facts, the parties' briefs, and the applicable statutory and case law. Based on the reasons set forth in this Memorandum Opinion, the Court finds in favor of Movant and holds that the disaster payment in dispute is property of Respondent's bankruptcy estate.

STIPULATED FACTS

According to the Stipulated Facts submitted by the parties, Respondent planted approximately 223 acres of seed wheat in November 2000. Respondent planted approximately 374 acres of seed cotton in May 2001. Respondent used regular farming practices to grow the crops to harvest. During 2001, Respondent's crops were subjected to drought conditions and Respondent harvested the crops at reduced yields. Due to these low yields, Respondent was unable to pay for his farm-related debt incurred to produce the crop. Respondent filed a Chapter 12 petition on May 29, 2002 and subsequently converted his case to Chapter 7 on January 2, 2003.

The Agricultural Assistance Act of 2003 ("Act") was signed into law on February 20, 2003. The Act provided assistance to farmers who suffered losses due to weather-related disasters or other emergency conditions which affected their 2001 or 2002 crops. The farmers were allowed to select either the 2001 or 2002 crops as the basis for determining their disaster payment. Respondent applied on January 30, 2004 for a disaster payment for the losses he incurred on his 2001 crops. In February 2004, Respondent received a disaster payment from the United States Department of Agriculture ("U.S.D.A.") Farm Service Agency ("F.S.A.") in the amount of $41,566 for the losses Respondent incurred on his 2001 crops.

THE PARTIES' CONTENTIONS

Movant contends the disaster payment Respondent received under the Act is property of Respondent's bankruptcy estate under 11 U.S.C. § 541(a)(6), as proceeds of the pre-petition crops. Movant cites to numerous cases to support his contention. *See Farm Pro Serv., Inc. v. Brown (In re Farm Pro Services, Inc.)*, 276 B.R. 620 (D. N.D. 2002); *Lemos v. Rakozy (In re Lemos)*, 243 B.R. 96 (Bankr. D. Idaho 1999); *and White v. U.S. (In re White)*, No. BRL88-00971C,

1989 WL 146417 (Bankr. N.D. Iowa 1989). Further, Movant argues that *Drewes v. Vote (In re Vote)*, 261 B.R. 439 (8th Cir. B.A.P. 2001)("*Drewes*"), *aff'd*, *Drewes v. Vote (In re Vote)*, 276 F.3d 1024 (8th Cir. 2002)("*Vote*"), a case relied upon by Respondent, applies only to issues arising under 11 U.S.C. § 541(a)(1), not 11 U.S.C. § 541(a)(6). 11 U.S.C. §§ 541(a)(1) & (6)(1993 & Supp. 2003); *Vote*, 276 F.3d at 1027; *Drewes*, 261 B.R. at 441; *see also Farm Pro*, 276 B.R. at 624.

Movant distinguishes the present case from this Court's decision in *In re Julian Thaggard*, No. 01-60571-JTL, *In re Paige Thaggard*, No. 01-60575-JTL, and *In re Winfred Jones*, No. 01-70513-JTL, slip op. at 7-8 (Bankr. M.D. Ga. April 3, 2003)(Laney, J.)(collectively "*Thaggard*"). In *Thaggard*, this Court ruled that peanut bases, assigned to the debtors by the U.S.D.A. F.S.A. after they filed bankruptcy petitions, were not property of the estate. *Id.* at 7-8. This Court based its decision in *Thaggard* on payment-in-kind ("P.I.K.") cases and a 9th Circuit Court of Appeals decision about fishing rights assigned to a debtor by the United States Department of Commerce post-petition. *Id.* at 6-7 (citing *Sliney v. Battley (In re Schmitz)*, 270 F.3d 1254, 1255 (9th Cir. 2001)("*Schmitz*"); *Kingsley v. First Am. Bank of Casselton (In re Kingsley)*, 865 F.2d 975, 976 (8th Cir. 1989); *Schneider v. Nazar (In re Schneider)*, 864 F.2d 683, 684 (10th Cir. 1988); and *In re Schmaling*, 783 F.2d 680, 681 (7th Cir. 1986) as support for its decision). However, Movant argues that this Court was correct when it stated in *Thaggard* that there was "little doubt" about disaster payments being property of the bankruptcy estate, if tied to pre-petition crops. *Id.* at 5-6.

Movant argues that the enactment date of the Act is irrelevant. Movant urges that, because the Act relates back to pre-petition crops, the effective date of the Act should also relate back. Further, Movant argues that allowing Respondent to use the enactment date of the Act as a bright-line test to cut off the bankruptcy estate's interest in proceeds

of estate property produces an absurd result. Finally, Movant argues that to exclude the disaster payment from the bankruptcy estate would be unfair to the creditors.

Respondent contends the disaster payment he received under the Act is not property of his bankruptcy estate because his right to the disaster payment did not accrue until after he had filed for bankruptcy protection and converted his case to one under Chapter 7 of the United States Bankruptcy Code ("Code"). Respondent distinguishes *In re Norville*, 248 B.R. 127 (Bankr. C.D. Ill. 2000) and *White*, because the debtors in those cases were in Chapter 12, thus 11 U.S.C. § 1207 was applicable. 11 U.S.C. § 1207 (1993 & Supp. 2003); *Norville*, 248 B.R. at 129; *White*, 1989 WL 146417 at 1. Respondent distinguishes *Boyett v. Moore (In re Boyett)*, 250 B.R. 817 (Bankr. S.D. Ga. 2000); *Lesmeister v. Lesmeister (In re Lesmeister)*, 242 B.R. 920 (Bankr. D.N.D. 1999) and *Kelley v. Ring (In re Ring)*, 169 B.R. 73 (Bankr. M.D. Ga. 1993)(Laney, J.), cases cited by this Court in *Thaggard*, because the disaster payment statutes were passed prior to the debtors' filing bankruptcy petitions in each of those three cases. *Thaggard*, slip op. at 5; *Boyett*, 250 B.R. at 818; *Lesmeister*, 242 B.R. at 922-923; *Ring*, 169 B.R. at 74.

Respondent distinguishes *Lemos* because the disaster payment statute in that case was passed prior to the case being converted from Chapter 12 to Chapter 7. *Lemos*, 243 B.R. at 97. Additionally, Respondent argues that the Bankruptcy Court decision in *Battley v. Schmitz (In re Schmitz)*, 224 B.R. 117 (Bankr. D. Alaska 1998), supplemented by 232 B.R. 173 (Bankr. D. Alaska 1999), *aff'd In re Schmitz*, 246 B.R. 452 (9th Cir. B.A.P. 1999)("*Battley*"), relied upon by the court in *Lemos*, was later overturned by the United States Court of Appeals for the 9th Circuit in *Schmitz*. *Schmitz*, 270 F.3d at 1258; *Lemos*, 243 B.R. at 99; *Battley*, 224 B.R. at 124. Further, Respondent contends that *Lemos* was effectively overturned by the decision in *In re Stallings*, 290 B.R. 777 (Bankr. D. Idaho 2003). *Stallings*, 290 B.R. at 781-782;

Lemos, 243 B.R. at 101. The court in *Stallings*, upon reviewing its own prior decision in *Lemos*, determined that the law had changed since its *Lemos* decision. *Id.* The court came to the conclusion, under 11 U.S.C. §§ 541(a)(1)&(6), that disaster payments received from disaster payment statutes passed after the filing of a bankruptcy petition were not property of the estate. 11 U.S.C. §§ 541(a)(1)&(6)(1993 & Supp. 2003); *see Stallings*, 290 B.R. at 781-784. The court reasoned that the 9th Circuit in *Schmitz* impliedly disapproved of post-petition government payments being classified as proceeds under 11 U.S.C. § 541(a)(6). 11 U.S.C. § 541(a)(6)(1993 & Supp. 2003); *Schmitz*, 270 F.3d at 1256-1258; *see Stallings*, 290 B.R. at 783, n. 5. Respondent argues Stallings makes it clear that a disaster payment statute must be passed pre-petition for a Chapter 7 bankruptcy estate to have any interest in the payment authorized by the statute, even as proceeds under 11 U.S.C. § 541(a)(6). *Id.*

Respondent argues *Schmitz* is in agreement with the 8th Circuit Bankruptcy Appeals Panel ("B.A.P") decision in *Drewes*, which was affirmed by the 8th Circuit on appeal. *Schmitz*, 270 F.3d at 1258; *Drewes*, 261 B.R. at 441, 444; *see Vote*, 276 F.3d at 1027. In *Vote*, the debtor filed a Chapter 7 bankruptcy petition prior to the crop disaster statute being enacted by Congress. *Vote*, 276 F.3d at 1026. While the 8th Circuit Court of Appeals did not address 11 U.S.C. § 541(a)(6), the court determined that, because the debtor did not have a right to the disaster payment upon the filing of his case, the disaster payment was not property of the estate under 11 U.S.C. § 541(a)(1). 11 U.S.C. §§ 541(a)(1)&(6)(1993 & Supp. 2003); *Vote*, 276 F.3d at 1026-1027. Respondent urges that this is consistent with the cases decided under 11 U.S.C. § 541(a)(6), all of which involved disaster payment statutes that were passed pre-petition. 11 U.S.C. §§ 541(a)(6)(1993 & Supp. 2003).

Respondent argues that the court in *Farm Pro* reached the right result on the wrong grounds. *Farm Pro*, 276 B.R. at

623-625. The court in *Farm Pro* ruled that the government payments were property of the estate under 11 U.S.C. § 541(a)(6), reasoning that the *Vote* decision was based on 11 U.S.C. § 541(a)(1), not (a)(6). 11 U.S.C. §§ 541(a)(1)&(6)(1993 & Supp. 2003); *Farm Pro*, 276 B.R. at 624. Respondent contends the disaster payments in *Farm Pro* were property of the estate because the disaster payment statute was passed while the debtors were involved in a Chapter 12 bankruptcy proceeding, thus 11 U.S.C. § 1207 was involved. 11 U.S.C. § 1207 (1993 & Supp. 2003); *Farm Pro*, 276 B.R. at 622-623; *see White*, 1989 WL 14641 at 6.

Respondent argues that all of the decisions he cited can be read to be consistent. First, Respondent urges that the cases highlight a critical difference between a Chapter 7 liquidation case and a Chapter 12 case, where there is an ongoing estate which can acquire property after the filing of the petition. Second, Respondent argues that a portion of this Court's memorandum opinion in *Thaggard*, which Respondent considers dicta but was relied upon by Movant, was incorrect. *Thaggard*, slip op. at 5-6. Respondent cites to the following passage in *Thaggard* as incorrect:

> "Later cases have extended the ruling to situations where the bill that provided the disaster relief was passed after the case was filed. *See Boyett v. [Moore] (In re Boyett)*, 250 B.R. 817, 822 (Bankr. S.D. Ga. 2000)[(Dalis, J.)]; *and Lemos v. Rakozy (In re Lemos)*, 243 B.R. 96, 99-100 (Bankr. D. Idaho 1999). Cases holding this include *Lemos*, heavily relied upon by Trustee, and *Boyett*, cited by some of the parties. *See id.* There appears to be little doubt as to disaster payments because they are related to a particular crop that would have been planted before the case was filed. Those cases may be decided under 11 U.S.C. § 541(a)(1) or (a)(6), but in either case the result seems to be that disaster payments are property of the estate." *Id.*

Respondent urges that this is incorrect. Respondent states that *Lemos* and *Farm Pro* are the only two decisions to determine that disaster payments received from disaster payment statutes enacted post-petition are property of the estate. *Farm Pro*, 276 B.R. at 622-623; *Lemos*, 243 B.R. at 97. Respondent maintains that these two decisions are no longer good law. *See Stallings*, 290 B.R. at 780-784.

CONCLUSIONS OF LAW

Movant cites 11 U.S.C. § 541(a)(6) as authority for the proposition that the disaster payment received by Respondent is property of the estate. 11 U.S.C. §§ 541(a)(6)(1993 & Supp. 2003). Section 541(a)(1) defines property of the estate as all legal or equitable interests of the debtor, wherever located and by whomever held, as of the commencement of the case, subject to certain exceptions that are not relevant here. 11 U.S.C. § 541(a)(1)(1993 & Supp. 2003). Section 541(a)(6) extends the definition of property of the estate to include proceeds, product, offspring, rents, or profits of or from property of the estate, except for post-petition wages earned by an individual debtor after the commencement of the case. 11 U.S.C. § 541(a)(6)(1993 & Supp. 2003).

The disaster payment in this case can be specifically tied to a pre-petition crop that had been harvested and sold by Respondent pre-petition ("2001 crop"). The 2001 crop itself cannot be property of the estate because it was not in existence on the date Respondent filed his bankruptcy petition. The crop that would be property of the estate would have been any crops in the ground as of the petition date ("2002 crop"). Therefore, the 2001 crop disaster payment cannot be considered proceeds of estate property.

However, what is property of the estate is the right to the 2001 crop disaster payment, however contingent it may have been on the filing date. The right to the disaster payment was a pre-petition inchoate *right* that vested or became choate post-petition upon the enactment of the Act. Upon the

occurrence of the disaster, Respondent had the right to collect disaster payments from the government, if such legislation was passed. Further, it would be inequitable to allow Respondent to retain the 2001 crop disaster payment. Congress could not have intended to give Respondent a windfall while avoiding paying the creditors whose extension of credit funded the 2001 crop.

This case is distinguishable from *Schmitz* and *Thaggard*. *Schmitz*, 270 F.3d at 1255-1256; *Thaggard*, slip op. at 2-3. In *Schmitz* and *Thaggard*, the government assigned rights to the debtors which would produce income for future activities. *Id.* The rights had income generating potential, i.e. income from selling the rights as in Schmitz and income for farming peanuts as in *Thaggard*. *Id.* However, the income generating potential was based on future post-petition activities, not pre-petition activities, i.e. the owner of the rights had to farm or fish in the future to receive the income. While the rights were based on average yields from the debtors' pre-petition activities, they were not rights to income for the pre-petition activities.

In the present case before the Court, Respondent had the right to the disaster payment based on his pre-petition farming activity in 2001. The disaster payment received by Respondent post-petition stemmed from an inchoate right he acquired pre-petition. Therefore, the disaster payment is property of the estate under 11 U.S.C. § 541(a)(1). 11 U.S.C. § 541(a)(1)(1993 & Supp. 2003). The Court finds in favor of Movant. An order in accordance with this Memorandum Opinion will be entered.

DATED this 20th day of May, 2004.

/s/

JOHN T. LANEY, III
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

IN RE:	:	
	:	
RICKY W. BRACEWELL	:	CASE NO. 02-60546
Debtor.	:	CHAPTER 7
	:	
	:	
WALTER W. KELLEY,	:	CONTESTED
Movant,	:	MATTER
	:	
vs.	:	
	:	
RICKY W. BRACEWELL,	:	
Respondent	:	
	:	
	:	

ORDER

In accordance with the Memorandum Opinion issued this date, the Court finds in favor of Walter W. Kelley ("Movant") on his Motion to Determine Whether Crop Disaster Payment is Property of the Estate.

ORDERED this 20th day of May, 2004.

/s/

JOHN T. LANEY, III
UNITED STATES BANKRUPTCY JUDGE

(2)

No. 06-739

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

WALTER W. KELLEY,

Petitioner,

v.

RICKY WAYNE BRACEWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The filing of a bankruptcy petition creates a "bankruptcy estate," defined by statute to include those property rights held by the debtor "as of the commencement of the case." The bankruptcy estate also includes proceeds of property of the estate. The question presented is whether, when a debtor obtains a right to payment under a farmer bailout program, enacted by Congress *after* the filing of the bankruptcy petition, that right to payment is part of the bankruptcy estate.

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IN THE

Supreme Court of the United States

No. 06-739

WALTER W. KELLEY,

Petitioner,

v.

RICKY WAYNE BRACEWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Ricky Wayne Bracewell submits this brief in response to this Court's Order dated January 4, 2007, directing that he respond to the Petition.

The Petition should be denied. Each of the three courts of appeals to address the specific question presented—whether a payment made under a farmer bailout program enacted after the filing of a bankruptcy petition is part of the debtor's bankruptcy estate—has held that it is not. That unanimous conclusion is correct. Indeed, it is mandated by the plain statutory language of section 541(a) of the Bankruptcy Code. 11 U.S.C. § 541(a).

In the absence of a circuit split on the specific question presented, Petitioner argues that lower courts are divided over the continued vitality of this Court's pre-Bankruptcy Code holding in *Segal* v. *Rochelle*, 382 U.S. 375 (1966). That division of authority is illusory. *Segal* held that a tax refund

to which a debtor is statutorily entitled as of the petition date—but that is not actually *paid* until after the petition—is part of the bankruptcy estate. That holding is noncontroversial and remains in force.

The basic and longstanding rule, now codified in 11 U.S.C. § 541(a)(1), is that all rights that the debtor has as of the petition date—including rights that are contingent as of that time—are property of the bankruptcy estate. Accordingly, if after the bankruptcy filing, the debtor receives payments on an insurance policy that covered pre-petition losses, a tax refund related to pre-petition income, or a payout on a lottery ticket that the debtor bought before the bankruptcy, all of those payments are property of the bankruptcy estate, and must be turned over to the trustee for distribution to creditors. That is the principle the *Segal* Court (applying the predecessor statute—the Bankruptcy Act of 1898) was capturing when it said that a payment is part of the estate if it is "sufficiently rooted in the pre-bankruptcy past." 382 U.S. at 380.

At the same time, that statement does not mean, and has never meant, that the mere fact that a post-bankruptcy payment can find some "root" in the pre-bankruptcy past renders that payment part of the bankruptcy estate. For example, post-bankruptcy earnings are paradigmatically *outside* the bankruptcy estate—they are property of the individual debtor—even if a trustee can prove that the debtor's income is "rooted" in his pre-bankruptcy education. By the same token, a post-bankruptcy gift received by the debtor is likewise outside of the bankruptcy estate, even if the *reasons* for the gift relate to actions that took place before the bankruptcy. Because the debtor had no right—not even a contingent right—to those payments as of the filing of the bankruptcy, these payments all fall outside the bankruptcy estate.

That is the principle applied by the court of appeals below, and each of the courts of appeals to consider whether payments made under farmer relief programs enacted *after* a debtor's bankruptcy case are property of the estate. *See*

Pet. App. 1a-43a; *Burgess* v. *Sikes (In re Burgess)*, 438 F.3d 493, 503 (5th Cir. 2006) (en banc); *Drewes* v. *Vote (In re Vote)*, 276 F.3d 1024, 1026-1027 (8th Cir. 2002). These courts have held—quite correctly—that the payments received under these programs are more like a post-bankruptcy gift than they are like a post-bankruptcy payment on a pre-bankruptcy insurance policy. For present purposes, however, the critical point is that the lower court decisions applying *Segal* are in complete harmony. Whatever disagreement may exist about the continued application of the so-called "*Segal* test" is purely semantic. The holdings of the cases reflect no division of authority.

Nor is there disagreement in the courts of appeals on whether the payments are "proceeds" of property of the estate—which are themselves estate property pursuant to 11 U.S.C. § 541(a)(6). Two of the three cases on which the Petition relies for that proposition do not involve the construction of the Bankruptcy Code at all, but are instead addressed to the scope of the term "proceeds," under state contract law, when used in a security agreement. *See In re Schmaling*, 783 F.2d 680 (7th Cir. 1986); *Pombo* v. *Ulrich (In re Munger)*, 495 F.2d 511 (9th Cir. 1974). And the only case involving a question of federal law held that the payment at issue—a "payment-in-kind" made to a farmer in return for not planting a crop—was *not* property of the bankruptcy estate. *Schneider* v. *Nazar (In re Schneider)*, 864 F.2d 683 (10th Cir. 1988). The Tenth Circuit there emphasized that "[o]ur holding is narrow," *id.* at 686, and that holding is fully in accord with that of the Eleventh Circuit here. The Petition should be denied.

STATEMENT OF THE CASE

A. Proceedings Below

1. Respondent Ricky Wayne Bracewell planted approximately 223 acres of seed wheat in November 2000 and approximately 374 acres of seed cotton in May 2001. Pet. App. 2a, 47a, 66a. During 2001, Respondent's crops were plagued by drought, resulting in substantially reduced crop

yields. *Id.* Due to the reduced yields, Respondent was left unable to pay his farm-related debts. *Id.*

On May 29, 2002, Respondent filed a chapter 12 bankruptcy petition in the United States Bankruptcy Court for the Middle District of Georgia. Pet. App. 2a, 47a, 66a. On January 2, 2003, Respondent converted his bankruptcy case to chapter 7, and Petitioner was appointed as the chapter 7 trustee. *Id.* at 1a-2a, 65a- 66a.

Thereafter, as part of an effort to provide assistance to farmers who suffered losses due to weather-related disasters or other emergency conditions in 2001 or 2002, Congress enacted the Agricultural Assistance Act of 2003, Pub. L. No. 108-7, div. N., Tit. II, 117 Stat. 538 (2003). *See* Pet App. 3a, 47a-48a, 66a. That Act was signed into law on February 20, 2003. *Id.*

On January 30, 2004, Respondent applied for assistance under the Act, to which he was entitled on account of his 2001 failed crops. The next month, Respondent received a payment from the United States Department of Agriculture in the amount of $41,566. Pet. App. 3a, 48a, 66a.

2. Petitioner filed a motion in the bankruptcy court seeking a determination that the $41,566 assistance payment was estate property. Pet. App. 48a, 66a. The bankruptcy court held that the payment was property of the estate under section 541(a)(1), concluding that the payment "stemmed from an inchoate right [Respondent] acquired pre-petition." *Id.* at 72a. The bankruptcy court rejected, however, the argument that the payment was "proceeds" of property of the estate, noting that the payment is traceable only to the 2001 crop, and the "2001 crop itself cannot be property of the estate because it was not in existence on the date Respondent filed his bankruptcy petition." *Id.* at 71a.

3. The district court affirmed in part, and reversed in part. Specifically, the district court held that the assistance payment belonged to the debtor individually and was not property of the estate under either section 541(a)(1) or 541(a)(6). Pet. App. 64a.

With respect to section 541(a)(1), the district court rejected the bankruptcy court's conclusion that Respondent had any legally cognizable interest, even a contingent one, as of the filing of the bankruptcy:

> Without the crop disaster legislation, growing crops and suffering crop loss—no matter how sufficiently rooted to the pre-bankruptcy past—are of no legal significance and create no right. . . . [I]t is the crop disaster legislation that makes growing and suffering certain crop losses relevant by attaching new legal consequences to events completed before the legislation's enactment.

Pet. App. 55a (footnote omitted). The district court expressly distinguished this Court's decision in *Segal* on the ground that the debtors in *Segal* had more than a mere hope that they might recover tax refunds; rather, the debtors had a contingent right to the payment of tax refunds as of the commencement of their cases. *Id.*

The district court agreed, however, with the bankruptcy court's conclusion that the payment was not "proceeds" of property of the estate under 11 U.S.C. § 541(a)(6) reasoning, as the bankruptcy court had, that section 541(a)(6) "could not retroactively create a property interest that did not exist at the commencement of the case." Pet. App. 57a.

4. The court of appeals affirmed. First, the court of appeals explained that the plain language of section 541(a)(1) "makes the commencement of the bankruptcy case the key date for property definition purposes." Pet. App. 3a. The Eleventh Circuit gave a literal reading to section 541(a)(1), providing that the debtor's interest in property "as of the commencement of the case" becomes property of the bankruptcy estate. Where the authorizing legislation at issue was not enacted until after the bankruptcy filing, the court of appeals held that Respondent had no cognizable legal interest in the assistance payment as of the petition date. *Id.* at 3a-7a.

Second, the court of appeals held that, for the same reasons, the assistance payment could not be "proceeds" of estate property under section 541(a)(6). The Eleventh Circuit concluded that "nothing in § 541(a)(6) pushes the later-acquired legal or equitable interest back into the estate." Pet. App. 18a.

B. Statutory Background

The purpose of a liquidation proceeding under chapter 7 of the Bankruptcy Code is to provide a fair distribution of the debtor's assets among creditors. The chapter 7 trustee is tasked with collecting the property of the estate and distributing such property in satisfaction of creditors' claims. 11 U.S.C. §§ 704, 726.

To that end, the commencement of a bankruptcy case creates an estate comprised of "all legal or equitable interests of the debtor in property *as of the commencement of the case*." 11 U.S.C. § 541(a)(1) (emphasis added).[1] "[T]he term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *Segal* v. *Rochelle*, 382 U.S. 375, 379 (1966). For instance, if a debtor purchased an insurance policy or a lottery ticket prior to the commencement of the bankruptcy case, any resulting payment—if the debtor sustains an insured loss or if the debtor's number is chosen—is part of the estate because, on the petition date, the debtor held a contractual right to payment should certain contingencies occur. *See, e.g.*, Pet. App. 56a. Similarly, when a debtor holds a right to payment at the time of a bankruptcy filing, whether vested, unmatured,

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[1] Although federal law determines whether an interest is property of the bankruptcy estate, nonbankruptcy law—typically state law—determines the nature and existence of a debtor's right to property. *See Barnhill* v. *Johnson*, 503 U.S. 393, 398 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." (citation omitted)); *see also Butner* v. *United States*, 440 U.S. 48, 55 (1979). Because the disaster relief payment in the instant case is a creation of federal law, no issues of state law are implicated.

or contingent, that right becomes property of the bankruptcy estate.

While the concept of estate property is broadly construed, it is not unlimited. Congress has expressly cautioned that the Bankruptcy Code "is not intended to exp[a]nd the debtor's rights against others more than they exist at the commencement of the case." S. Rep. No. 95-989, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868; H.R. Rep. No. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323. Thus, when a debtor has no interest in property as of the petition date, not even a contingent or unmatured interest, then any subsequent payment received falls outside the estate. For instance, there is no doubt that a gift received post-petition does not constitute property of the estate. In addition, certain property is specifically excluded or exempted from the estate by statute. 11 U.S.C. §§ 541(b), 522. For example, Congress specifically excluded from the bankruptcy estate an individual debtor's wages for services performed after the filing of a bankruptcy petition. 11 U.S.C. § 541(a)(6).

Thus, while the scope of section 541(a) is broad, it is limited temporally by the plain language of the statute to interests that exist at the moment that the bankruptcy petition is filed.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals below is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court is therefore not warranted.

I. THE COURTS OF APPEALS TO HAVE CONSIDERED THE QUESTION AGREE THAT FARMER BAILOUT PAYMENTS UNDER PROGRAMS ENACTED AFTER A BANKRUPTCY PETITION FALL OUTSIDE THE BANKRUPTCY ESTATE

This Court should not grant certiorari because there is no disagreement among the courts of appeals on the question presented. The Fifth, Eighth, and Eleventh Circuits have addressed the exact issue of whether a right to pay-

ment made under a farmer bailout program enacted after the filing of a bankruptcy petition is property of the debtor's bankruptcy estate. Each has correctly held that it is not. Pet. App. 6a-7a, 21a; *Burgess* v. *Sikes (In re Burgess)*, 438 F.3d 493, 503 (5th Cir. 2006) (en banc); *Drewes* v. *Vote (In re Vote)*, 276 F.3d 1024, 1027 (8th Cir. 2002). Rather, these courts have held that a debtor in Respondent's position has no legal or equitable interest in crop bailout payments unless and until the authorizing legislation becomes law. Before such legislation is passed, the debtor merely has "a hope and maybe an expectation that legislation will be enacted for his relief." Pet. App. 6a. The courts of appeals unanimously agree that this hope or expectation is not enough to give rise to a cognizable property interest as of the petition date. *Id*; *In re Burgess*, 438 F.3d at 503; *In re Vote*, 276 F.3d at 1027.

The court of appeals below concluded that, as of the petition date, Respondent had no right to crop bailout payments made under The Agricultural Assistance Act of 2003 because his interest in such payments, contingent or otherwise, did not exist or accrue until the Act was passed, which occurred after the commencement of Respondent's bankruptcy case.[2] Pet. App. 5a-7a.

On facts nearly identical to those presented by the Petition and involving assistance payments under the same Act, the Fifth Circuit, sitting en banc, refused, on the same grounds, to re-open a farmer's bankruptcy case to include post-petition payments made to the debtor under the Act. Because the Act was not law when the debtor filed his bankruptcy petition, the Fifth Circuit concluded there was no es-

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[2] Respondent's bankruptcy case began as a chapter 12 proceeding, triggering 11 U.S.C. § 1207(a)(1), which effectively extends the section 541(a)(1) cutoff date for measuring property of the estate from the date of filing to the time that the case is converted to chapter 7. In the instant case, section 1207(a)(1) is not applicable because the conversion of Respondent's chapter 12 case to chapter 7 predated the enactment of The Agricultural Assistance Act of 2003. Accordingly, the parties effectively refer to the date of the chapter 7 conversion as the petition date. Pet. 6 n.2.

tate property at the time of the bankruptcy petition. The Fifth Circuit reasoned that for the temporal limitation of section 541(a)(1) to have any meaning at all, it would be necessary for the debtor to have a pre-petition right to the assistance payment for such post-petition payment to constitute property of the estate. *In re Burgess*, 438 F.3d at 503. As of the petition date, the debtor did not and could not have a right, contingent or otherwise, to hypothetical payments under a then nonexistent law.

Similarly, in *In re Vote*, the Eighth Circuit held that comparable assistance payments were not property of the estate under section 541(a)(1) because the legislation authorizing such payments was enacted six weeks after the petition date. 276 F.3d at 1026. The Eighth Circuit reasoned that to include such payments in the estate would give the trustee interests in property beyond what the debtor had at the commencement of his bankruptcy case. *Id.*

Other courts of appeals are also in accord. For example, while addressing a slightly different question, the Ninth Circuit's decision in *Sliney* v. *Battley (In re Schmitz)*, 270 F.3d 1254, 1257-1258 (9th Cir. 2001), reaches the same result as the Fifth, Eighth, and Eleventh Circuits. The question before the Ninth Circuit was whether a fishing quota for future years awarded under regulations promulgated post-petition was property of the debtor's estate. After the debtor filed his bankruptcy petition in *Schmitz*, he was awarded a fishing quota for future years calculated on his pre-filing fishing history. *Id.* at 1255. While the quota was based on pre-petition facts, the regulations creating the quota rights were not promulgated at the time Schmitz filed for bankruptcy. *Id.* at 1257. The Ninth Circuit concluded that the quota rights were not part of the bankruptcy estate because the regulations creating those rights were not adopted until after the petition date. *Id.* at 1257-1258.

Thus, the courts of appeals that have considered the issue presented by the Petition uniformly agree that no legal or equitable interest in the right to receive crop relief payments exists until assistance legislation becomes law. This

case presents no unresolved question of law worthy of consideration by this Court.

II. THE ASSERTED SPLIT ON THE "SUFFICIENTLY ROOTED" TEST IS ILLUSORY

In the absence of a circuit split on the question presented, Petitioner argues that the courts of appeals are divided over the continued vitality of this Court's pre-Bankruptcy Code decision in *Segal* v. *Rochelle*, 382 U.S. 375 (1966). That supposed division of authority among the circuit courts is illusory. The holding of *Segal* is that a debtor's entitlement to a tax refund that was paid post-bankruptcy, but to which the debtor became legally entitled by virtue of pre-bankruptcy losses, was property of the debtor's bankruptcy estate under the Bankruptcy Act. That holding is wholly consistent with current decisional law under the Bankruptcy Code. Petitioner's asserted split does not implicate the holding of *Segal*, only its language.

The question before the Court in *Segal* was whether tax refunds obtained post-petition by the debtors were "property" of the bankruptcy estate under § 70a(5) of the prior Bankruptcy Act, the predecessor to 11 U.S.C. § 541(a)(1). As used in § 70a(5), however, the term "property" was undefined. Accordingly, the Court reasoned that whether the tax refunds were property of the estate turned on whether the debtors held a right to payment of the refund "at the time [the] bankruptcy petitions were filed." *Segal*, 382 U.S. at 380. Because the debtors held a right, as of the bankruptcy filing, to receive a future tax refund, the Court held that the right to that refund was property of the bankruptcy estate.

In explaining its holding, the *Segal* Court noted that the tax refund was "sufficiently rooted in the pre-bankruptcy case past and so little entangled with the bankrupts' ability to make an unencumbered fresh start," that it was appropriate to treat the refund as part of the estate. 382 U.S. at 380. The Court, however, did not purport to establish a "sufficiently rooted" test for determining whether a right to payment was property of a bankruptcy estate. Rather, the

Court simply found that the right to the tax refund at issue in that case arose pre-petition, and thus was property of the estate.

Segal's specific holding remains unquestioned by the courts of appeals. Indeed, Petitioner concedes that the *Segal* holding remains in force under the law of the Second, Fourth, Sixth, and Ninth Circuits. *See, e.g., United States* v. *Kennedy*, 2000 WL 1720962, at * 4 (2d Cir. Nov. 17, 2000) (unpublished) (concluding proceeds of a pre-petition contract were property of the estate under 11 U.S.C. § 541(a)(6)); *Beaman* v. *Shearin (In re Shearin)*, 224 F.3d 346, 351 (4th Cir. 2000) (affirming post-petition payment of law firm profits property of the estate where debtor held legally cognizable interest in law firm as of the petition date); *Williams* v. *Johnson (In re Williams Bros. Asphalt Paving Co.)*, 1995 WL 316799, at *1 (6th Cir. May 24, 1995) (unpublished) (affirming refund for crude oil overcharges was property of the estate where the right to the refund accrued pre-petition); *Rau* v. *Ryerson (In re Ryerson)*, 739 F.2d 1423, 1426 (9th Cir. 1984) (concluding debtor's estate includes contingent claims against third parties that exist as of the petition date).

Petitioner further acknowledges that decisions of the First, Third, Seventh, Tenth, and Federal Circuits, while neither addressing the issue presented by the Petition nor specifically employing the "sufficiently rooted" phraseology, are nonetheless in accord with the *Segal* holding. *See, e.g., Watman* v. *Groman (In re Watman)*, 458 F.3d 26, 33 (1st Cir. 2006); *Pension Transfer Corp.* v. *Beneficiaries Under Third Amend. To Fruehauf Trailer Corp. Ret. Plan No. 003 (In re Fruehauf Trailer Corp.)*, 444 F.3d 203, 211 (3d Cir. 2006); *Watson* v. *H.J. Heinz Co.*, 101 F. App'x 823, 825 (Fed. Cir. 2004); *In re Yonikus*, 996 F.2d 866, 869 & n.3 (7th Cir. 1993); *Barowsky* v. *Serelson (In re Barowsky)*, 946 F.2d 1516, 1518-1519 (10th Cir. 1991).

The Petition's asserted split rests on statements by the court of appeals below, and by the Fifth Circuit, rejecting the proposition that the "test" for whether a payment is

property of the estate is whether it is "sufficiently rooted" in the pre-bankruptcy past. But in doing so, those cases did not repudiate *Segal*'s holding, and created no division of authority. Rather, they correctly held that the language of section 541 of the Bankruptcy Code, not *Segal*'s functionally equivalent but verbally distinct "sufficiently rooted" language, established the governing test for determining whether a right to payment was property of the estate.

The court of appeals below addressed *Segal* only in response to the dissent's argument that the *Segal* phraseology should trump the plain language of section 541(a)(1). The panel majority rejected that proposition, making clear that the "sufficiently rooted" language of *Segal* may not be read, as the dissent suggested, to establish a "test" for when a right to payment is property of the bankruptcy estate. Rather, the controlling "test"—as *Segal* itself makes clear—turns on whether the debtor has a legally cognizable right to receive a future payment "as of the commencement of the case." 11 U.S.C. § 541(a)(1); *see also Segal*, 382 U.S. at 379 ("The main thrust . . . is to secure for creditors everything . . . the bankrupt may possess . . . when he files his petition.").

Similarly, the Fifth Circuit in *In re Burgess* acknowledged the continued applicability of the *Segal* holding but rejected the notion that *Segal*'s "sufficiently rooted" language constituted the governing test under section 541(a)(1). 438 F.3d at 498-499.

Although the courts of appeals may differ in the language that they have used, their holdings are in harmony. Thus, there is no disagreement among the courts of appeals that would merit this Court's intervention.

III. THERE IS NO DIVISION OF AUTHORITY ON THE MEANING OF THE TERM "PROCEEDS" IN SECTION 541(a)(6)

The Petition seeks to construct the appearance of a conflict between the decision of the court of appeals below in this case and decisions of the Seventh, Ninth, and Tenth Circuits, but no such conflict exists. The issues examined by the Seventh and Ninth Circuits are fundamentally different

from the section 541(a)(6) issue raised in this case—they involve constructions of security agreements governed by state law, not the Bankruptcy Code. And the Tenth Circuit determined, in accord with the Eleventh Circuit here, that the government farming assistance payments were not "proceeds" under section 541(a)(6).

The Seventh and Ninth Circuits have addressed the issue of whether, when a farmer signs a contract granting a creditor a lien on the farmer's crops, that farmer also grants a lien on certain assistance that the farmer later receives from the government. *In re Schmaling*, 783 F.2d 680 (7th Cir. 1986); *Pombo* v. *Ulrich (In re Munger)*, 495 F.2d 511 (9th Cir. 1974). These decisions involve the interpretation of specific contracts under state law, and turn on the intent of the farmers and the creditors in entering into the contracts. What is more, they address government assistance available on facts substantively different from those applicable to the Respondent under the Act.[3] The Seventh Circuit on its facts found that the assistance payments were not proceeds; the Ninth Circuit on its different facts reached the opposite conclusion. But more importantly, neither decision involves a construction of the Bankruptcy Code or otherwise turned on

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[3] Recent bankruptcy court decisions interpreting "property of the estate" issues under section 541(a)(6) as well as section 541(a)(1) with respect to federal subsidy programs have reached different conclusions based on the facts of each program. *See, e.g., In re Evans*, 337 B.R. 551, 554-557 (Bankr. E.D.N.C. 2005) (holding that different qualification requirements under different parts of legislation made some payments property of the estate but other payments property of the debtor); *First Nat'l Bank of Spearville* v. *Klenke (In re Klenke)*, 2004 WL 2192517, at *6 (Bankr. D. Kan. Feb. 3, 2004) (same); *In re Thaggard*, 2003 WL 24108186, at *3 (Bankr. M.D. Ga. Apr. 3, 2003) (holding payments were not property of the estate on a "close decision" that was highly fact-dependent); *In re Stallings*, 290 B.R. 777, 782-783 (Bankr. D. Idaho 2003) (holding postpetition disaster relief payment under government assistance program not established at time of bankruptcy filing not property of the estate). It is unsurprising that courts have reached differing outcomes based on distinguishable facts. This by no means evidences a split of authority on any question of federal law.

a matter of federal law. As such, the cases cannot conflict with the Eleventh Circuit's holding here.

The Seventh Circuit, in *In re Schmaling*, 783 F.2d at 684, found that a broad lien in all farm-related assets, granted in 1982 by a farmer to its bank lender, did not extend to commodities received by the farmer in 1983 under a government payment-in-kind program. Under that program, a farmer who agreed to refrain from growing crops on part of his land would receive a commodity equal to what his non-producing acreage would typically yield. The court examined the description of the specific collateral covered by the creditor's security agreement and applied state-law contract interpretation principles to conclude that the payments-in-kind were not "proceeds" on which the creditor had a lien. *Id.* at 682-683. The court reasoned that "proceeds" were generally understood to mean property "received in consequence of the disposition of collateral," and "in the instant case there was never a crop of which to dispose." *Id.* at 683. Accordingly, the Seventh Circuit did not mention or discuss section 541(a)(6), the Agricultural Assistance Act, crop disaster relief, failed crops, or even the concept of post-petition legislation.

The Ninth Circuit, in *In re Munger*, 495 F.2d at 512-513, examined a different security agreement in a different factual landscape, and found that a creditor, who was in 1966 and 1969 granted liens on sugar beet crops and their "proceeds," did have a lien on government subsidy payments made under the Sugar Act of 1948. The court considered whether the word "proceeds" in the security agreements contemplated the government subsidy payments under California state law. To reach its conclusion that the subsidy payments were "proceeds" for that purpose, the court needed to assume that the security agreements were drafted by the farmer and the creditor with that understanding of the word "proceeds," and that interested third parties could be expected to know that the farmer's crops were entitled to various conditional subsidy payments under the Sugar Act of 1948. *Id.* at 513. In other words, the court based its ruling

on the intent of the parties to the contract and whether the contract gave third parties notice of the creditor's liens. This too was a case that addressed only questions of contract interpretation. The Ninth Circuit had no occasion to address, and did not mention or discuss, section 541(a)(6), the Agricultural Assistance Act, crop disaster relief, failed crops, or post-petition legislation.

The only case cited by Petitioner that even raises a question of federal law was the Tenth Circuit's decision in *Schneider* v. *Nazar (In re Schneider)*, 864 F.2d 683 (10th Cir. 1988). The question presented in *Schneider* was whether a government payment under a payment-in-kind program similar to the one addressed by the Seventh Circuit in *Schmaling* was property of the debtor's bankruptcy estate under section 541(a)(6). The court held that such a payment was not property of the estate, distinguishing payments made on account of an agreement not to plant crops, from payments that "result from the actual disposition of a planted crop." *Id.* at 685. The court made clear that its holding was on that section 541(a)(6) basis alone: "Our holding is narrow. The proceeds of the payments-in-kind belong to the debtors [and not the estate/trustee] under § 541(a)(6) because [payment-in-kind] contract formation had not been completed as of the date of the petition, and there is no suggestion that the sequence of events was planned to defeat a trustee's claim." *Id.* at 686. In other words, the payments-in-kind were proceeds of the payment-in-kind contract, not the proceeds of any crops; and, because the debtor-farmer had no contractual or other legal right to the payments at the time of the bankruptcy, the payments could not be the proceeds of any such right under section 541(a)(6). The Tenth Circuit's decision in *Schneider* is therefore consistent with, and in fact its holding supports, the decision of the Eleventh Circuit below.

In addition, the Eleventh Circuit's decision is in full accord with the only other court of appeals decision expressly to consider the application of section 541(a)(6) to assistance payments made under a relief program enacted after the

bankruptcy—the Fifth Circuit's en banc decision in *In re Burgess*, 438 F.3d 493. There, the Fifth Circuit relied on two reasons for its holding that the assistance payments were not "proceeds" under section 541(a)(6). First, the payments are not "proceeds" of any petition-date right to such payments, because no petition-date right to such payments ever existed:

> [In contrast to the facts in *Segal*], Burgess suffered the crop loss before filing for bankruptcy, but he did not have a prepetition claim to, or interest in, the disaster-relief payment because the legislation authorizing the payment had not yet been enacted. If Burgess had no right or interest that constituted property within the meaning of § 541(a)(1) at the commencement of the case, then the payment he later received cannot be proceeds of property of the estate under § 541(a)(6).

Id. at 499. Second, the payments are not "proceeds" of any pre-petition "crop loss" of Burgess, because a "crop loss" alone is a "pure loss" and not an interest as of the bankruptcy filing from which proceeds can be generated. *Id.* at 503.

In sum, the decisions of the Seventh, Ninth, and Tenth Circuits cited by Petitioner as being in "conflict" with the Eleventh Circuit's decision below create no circuit split at all. This is not to say that no conflict could ever arise on the section 541(a)(6) issue (or, indeed, on the construction of section 541(a)(6)) addressed by the Fifth Circuit in *Burgess* and the Eleventh Circuit below. Indeed, the Petition is correct that some number of district and bankruptcy courts have reached conclusions at odds with those holdings. *See* Pet. 23-24. At this point, however, it is too soon to know whether other courts of appeals will adopt the unanimous conclusion of those courts of appeals to have addressed this issue, or will instead create a circuit split that might warrant review in this Court. In this case, however, this Court should apply its traditional criteria and deny the Petition, awaiting the

development of a conflict among the courts of appeals before granting review.

IV. The Eleventh Circuit's Holding Is Correct On The Merits

Review in this case is unwarranted for the additional reason that the decision of the court of appeals below is correct on the merits. As the Eleventh Circuit properly held, a payment arising under a statute that had not been passed by Congress as of the bankruptcy filing cannot be an "interest[] of the debtor in property *as of the commencement of the case*." 11 U.S.C. § 541(a)(1) (emphasis added). Nor is the payment "proceeds" of estate property under section 541(a)(6), since there is no sense in which the payment is received in "exchange" for the crops—the longstanding and traditional meaning of "proceeds."

A. Respondent Had No Legal Or Equitable Interest In The Assistance Payment As Of The Petition Date—As Such, The Payment Is Not Property Of The Estate Under Section 541(a)(1)

Section 541(a)(1) defines property of the bankruptcy estate as "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). This plain and unambiguous language makes clear that the petition date is the key date for purposes of defining what legal and equitable interests constitute property of the estate. Under section 541(a)(1), the estate succeeds only to those interests that the debtor had in property prior to the commencement of the bankruptcy case. *See, e.g.*, *Rutherford Hosp., Inc.* v. *RNH P'ship*, 168 F.3d 693 (4th Cir. 1999). "Property of the estate" generally does not include any property interests or income acquired by the debtor after the petition date, except to the extent that they fit into narrow categories such as proceeds or rents of estate property that existed on the petition date. 11 U.S.C. § 541(a)(6).

Courts addressing the issue of whether a post-petition payment is part of the bankruptcy estate in other contexts have held that such interests are not property of the estate

where no cognizable property interest existed on the petition date. *See, e.g., Segal*, 382 U.S. at 380 (observing future wages and promised gifts do not constitute property of the bankruptcy estate); *Lewis* v. *Chappo (In re Chappo)*, 257 B.R. 852, 854-855 (E.D. Mich. 2001) (affirming post-petition payment of bonus not included in employee's bankruptcy estate where employer had reserved right to terminate, modify, or suspend bonus program); *In re Mattice*, 81 B.R. 504, 507 (Bankr. S.D. Iowa 1987) (holding payments under feed and grain program not property of the estate where debtor had no legal right to such payments as of the commencement of the bankruptcy case); *Medor* v. *Lamb (In re Lamb)*, 47 B.R. 79, 81-83 (Bankr. D. Vt. 1985) (holding post-petition payment under milk diversion program not property of the estate where milk producer had no choate right of action on petition date).

The record in this case establishes without question (the relevant facts having been stipulated to below) that at the time Bracewell's bankruptcy case was converted to chapter 7, Bracewell had nothing more than a mere hope or expectation that crop bailout legislation would be enacted. At that time, no crop bailout legislation had been enacted into law. As the Eleventh Circuit logically reasoned, without such a law, there simply was no right to a relief payment. Pet. App. 6a-7a. "Not until the enactment of the legislation elevated Bracewell's hope to an entitlement did it become an interest cognizable under § 541(a)(1)." *Id.* at 7a. In this instance, that happened post-petition, thereby taking such payment outside the context of estate property.

B. The Assistance Payment Was Not "Proceeds" Of Estate Property Under Section 541(a)(6)

For an item of property to be "proceeds" under section 541(a)(6), it must be related to some *other* petition-date interest. And while there can be and often is a dispute as to how "related" the post-petition interest must be to the petition-date interest to qualify as proceeds, the key point here is that the "failed crops" are not property in which the debtor ever held an interest. Like "eaten food," "traveled

highways," or "lost time," "failed crops" are not themselves interests in property that can be said to generate "proceeds."

Put another way, if the payments at issue had been made pursuant to an insurance policy that had been issued with respect to the crops, the payments would, as a matter of logic and commonsense, be viewed as proceeds of the insurance policy—not the failed crops. The same is true here. Insofar as the payments are "proceeds" of anything, they are proceeds of The Agricultural Assistance Act of 2003—a legislative enactment that did not come into being until after the bankruptcy case.

The Petition offers two separate criticisms of the Eleventh Circuit's section 541(a)(6) holding. First, Petitioner states that the Eleventh Circuit erred in concluding that Bracewell's post-petition payments were "merely 'assistance'" and not "proceeds" under section 541(a)(6). Pet. 18-23. The central point of the court of appeals reasoning in this regard was that Congress "did not purport to purchase the ruined crops," but instead provided "*assistance*" to Bracewell. Pet. App. 18a. That conclusion was correct. As the Eleventh Circuit properly noted, because Bracewell had no interest as of the petition date in any property of which the payments could be proceeds, the payments cannot qualify as proceeds of any such interest.

Second, and relatedly, Petitioner argues that the Eleventh Circuit erred in concluding that Bracewell's "failed crops" were not property of the estate to which proceeds could relate under section 541(a)(6). Pet. 23-25. On this point, the Petition makes the alchemic mistake of turning Bracewell's "failed crops" into an interest that would qualify as property of the estate under section 541(a)(6). As discussed above, however, failed crops did not exist as of the petition date, and could not generate any "proceeds."

V. THE FUNDAMENTAL OBJECTIVES OF THE BANKRUPTCY CODE ARE NOT IMPLICATED BY THIS CASE

Petitioner identifies four principles that it labels "fundamental objectives" of the Bankruptcy Code and argues that these principles are contravened by the Eleventh Circuit's decision in "far reaching" respects. Pet. 25-30. This plea to principles of bankruptcy policy is unavailing.

Nearly all commentators identify two primary goals of the Bankruptcy Code: giving every honest debtor a fresh start and treating all similarly-situated creditors the same. *See, e.g.*, 5 Collier on Bankruptcy ¶ 541.01 (15th ed. rev. 2006); Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy Law*, 71 Am. Bankr. L.J. 483, 483 (1997). As to the first goal, the reasoning of the court of appeals below certainly facilitates the "fresh start" objective by preserving for the debtor's own use the assistance payment given to him by legislation enacted for his benefit after the conversion of his bankruptcy case. As to the second goal, this case does not present any type of intercreditor dispute. There is no suggestion that any one creditor should receive value from the debtor's estate to the detriment of another creditor. All of Bracewell's similarly-situated creditors are being treated equally, whether or not they will receive the value of Bracewell's assistance payment. The creditors might certainly receive a greater or lesser distribution from Bracewell's estate depending on whether or not the estate gets the post-petition payment, but the fundamental objective of equal treatment is not implicated.

Rather than implicating the two primary goals of the Bankruptcy Code, this case is limited to the far narrower question whether the value arising out of specific post-petition legislation should inure to the benefit of the debtor or his creditors. Petitioner's argument regarding the four "fundamental objectives" of the Bankruptcy Code substantially overstates the importance of this narrow dispute to the operation of bankruptcy law.

First, Petitioner argues that this case affects the protection of "security interests of creditors by denying them

access to funds based on the arbitrary date of filing by the debtor." Pet. 26. But Petitioner has identified no lien or security interest involved in this case at all, and has given no reason why a lienholder, as distinct from any other creditor, has been or would be adversely affected by the Eleventh Circuit's decision.

Second, Petitioner argues that this case might encourage a debtor to "race to the courthouse" and file a bankruptcy case in anticipation of legislation to be passed under which the debtor might receive some benefit that would, if the debtor waited, become property of the estate. Pet. 26. But Congress passed the Bankruptcy Code in part to prevent competing creditors from racing to the courthouse to gain priority over one another—not to prevent debtors from racing to the courthouse. *See, e.g.*, *Union Bank* v. *Wolas*, 502 U.S. 151, 161 (1991) (noting avoidance powers of trustee designed to discourage race to courthouse by creditors). And in any event, given the many vagaries of the legislative process, it is far too much to assume that debtors of any significant number would be as attuned to the benefits of prospective federal legislation as Petitioner suggests. In any event, Congress could certainly make clear in any new legislation whether the benefit should inure to a debtor or the debtor's creditors.

Third, Petitioner argues that the Eleventh Circuit's decision will allow farmer-debtors an undeserved windfall. Pet. 28. This "policy" concern simply assumes the conclusion that the Eleventh Circuit's decision was in error. If the Eleventh Circuit's decision is correct, then Bracewell received exactly what Congress intended to provide him. Describing the payment as a "windfall" adds nothing to the analysis.

Fourth, Petitioner argues that the Eleventh Circuit's decision encourages debtor abuse. Pet. 29. But this is simply a repackaged version of the farmer-debtor "race to the courthouse" argument, and fails for the same reason. In any event, bankruptcy jurisprudence is replete with examples of permissible "bankruptcy planning" in which a debtor makes

decisions regarding its assets and liabilities before it files a bankruptcy in order to maximize the protections available to debtors under the Bankruptcy Code. *See, e.g., Gill* v. *Stern (In re Stern)*, 345 F.3d 1036, 1043-1044 (9th Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) (finding debtor's transfer of assets from IRA to pension plan on eve of bankruptcy was not fraudulent); *Marine Midland Bus. Loans, Inc.* v. *Carey (In re Carey)*, 938 F.2d 1073, 1076-1078 (10th Cir. 1991) (affirming chapter 7 debtor's discharge notwithstanding prebankruptcy planning converting nonexempt to exempt assets). So long as the bankruptcy filing otherwise serves a proper bankruptcy purpose, such "bankruptcy planning" is nothing more than taking advantage of a right given to debtors by Congress. *See* H.R. Rep. No. 95-595, 361 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317; S. Rep. No. 95-989, 76 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5862 ("As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.").

Finally, Petitioner argues that the effects of the Eleventh Circuit's decision regarding a farmer-debtor and his benefits under a specific federal crop disaster statute "could be far-reaching." Pet. 29-30. Specifically, Petitioner contends that the decision below may impair a secured creditor's rights to adequate protection (presumably under 11 U.S.C. § 363(e), for example). But the Petitioner does not explain why this would be so, and it is difficult to imagine why this case—which does not involve secured creditors, liens, 11 U.S.C. § 363(e), or any similar issue—should affect the adequate protection afforded to secured creditors. And while Petitioner argues that lenders will be less likely to lend to farmers if the lenders do not have access to payments that the farmer might receive if (a) the farmer files bankruptcy, (b) Congress thereafter passes a law authorizing payments to farmers, (c) the farmer happens to apply for, qualify for, and receive such payments, and (d) those

payments were determined by reference to pre-bankruptcy losses, the remoteness and high degree of contingency of this circumstance makes it highly unlikely that the ruling will have any material effect on a lender's decision whether to extend credit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

WALTER W. KELLEY, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF RICKY WAYNE BRACEWELL,

Petitioner,

v.

RICKY WAYNE BRACEWELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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This case concerns a fundamental question in bankruptcy law: What interests constitute "property" (11 U.S.C. § 541(a)) to be included within the debtor's estate? In some cases (such as the crop losses and consequent bailout payments at issue here), that question is somewhat complex, because interests that might have seemed worthless or at least contingent as of the commencement of the bankruptcy case gain value during the case. For more than four decades, *Segal* v. *Rochelle*, 382 U.S. 375 (1966), has supplied crucial guidance for resolving temporally difficult questions about what interests are part of the estate, instructing courts to take a functional approach by assessing whether an interest is "sufficiently rooted in the pre-bankruptcy past" to warrant inclusion in the estate. *Id.* at 380. The Eleventh Circuit's split decision below, as well as a recent, sharply divided *en banc* opinion by the Fifth Circuit, definitively rejected *Segal*'s continued application. Pet. App. 12a ("[t]he *Segal* decision cannot mean what the *Burgess* dissenters said it did about the present Bankruptcy Code, because *Segal* was decided twelve years before Congress overhauled the Bankruptcy Code"); *In re Burgess*, 438 F.3d 493, 498 (5th Cir. 2006) (*en banc*) ("*Segal*'s 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code"), *quoted in* Pet. App. 12a. But see, *e.g.*, *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992) ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'"). Eviscerating *Segal* has created a direct conflict with four other circuits on an issue that leading bankruptcy scholars recognize will have an "important effect * * * on the scope of property of a debtor's bankruptcy estate." Br. Amici Curiae of Profs. Block-Lieb, Brubaker, Lipson, Rapoport, Rasmussen, Skeel, and Tabb ("Scholars' Br.") 4.

Aware that this Court would not jettison *Segal* on the grounds adopted below, respondent asserts that its vitality is not at issue here. Opp. 2. But to reach that conclusion—which is indispensable to the claim that the 4-2 conflict over

the continued application of *Segal* is "illusory" (*id.* at 1)—respondent urges a hopelessly narrow reading of what he calls *Segal*'s "specific holding" (*id.* at 11). That reading is irreconcilable with both the face of that decision and the widespread understanding that *Segal* established the "sufficiently rooted" test as an important tool for judges tasked with determining the extent of the debtor's estate.

Alternatively, respondent asserts that *Segal*'s "sufficiently rooted" test adds nothing to the interpretation of § 541(a)(1). Opp. 11-12. In respondent's view, § 541(a)(1) establishes the simple rule "that all *rights* that the debtor has as of the petition date—including *rights* that are contingent as of that time—are property of the bankruptcy estate," which he then identifies as the same "principle the *Segal* Court * * * was capturing when it said that a payment is part of the estate if it is 'sufficiently rooted in the pre-bankruptcy past.'" *Id.* at 2 (emphasis added). That view clearly was not shared by the Eleventh and Fifth Circuits, which, before expressly declaring that "'*Segal*'s "sufficiently rooted" test did not survive the enactment of the Bankruptcy Code,'" necessarily recognized the impact that decision would have here. Pet. App. 12a (quoting *Burgess*, 438 F.3d at 498).

Moreover, respondent's theory is simply incorrect, and in its own right is a radical narrowing of key Code terms. For starters, the plain text of § 541(a)(1) does not use the term "rights," instead employing the more expansive term "interests." No less important, *Segal* did not involve a "right"—even a contingent right—as of the time of petitioning. See *infra* p. 5. Rather, *Segal* employed the "sufficiently rooted" test to pull into the estate property that grew out of the debtor's pre-petition activities but in which the debtor had no legal "right" before filing. Perhaps that is why respondent concedes that *Segal*'s "sufficiently rooted" test is "verbally distinct" from § 541(a)(1), even as he urges—paradoxically—that the two are "functionally equivalent." Opp. 12. Perhaps that is also why respondent fails to confront an unbroken line of cases stretching back a century-and-a-half,

see *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983); *Williams* v. *Heard*, 140 U.S. 529 (1891); *Milnor* v. *Metz*, 41 U.S. (16 Pet.) 221 (1842), in which this Court consistently has taken a functional approach to deciding what interests are included in the debtor's estate. See Pet. 14-16; Pet. App. 29a-30a (Pryor, J., dissenting); *Burgess*, 438 F.3d at 510-512 (Jones, C.J., joined by Smith, Barksdale, Garza, DeMoss, Clement, & Owen, JJ., dissenting).

Beyond attempting an end-run around the circuit split, respondent's artificially narrow view of *Segal* serves another purpose: It allows respondent to ignore a long line of this Court's cases (discussed nowhere in the Brief in Opposition) holding that pre-Bankruptcy Code case law (such as *Segal*) is presumed, unless there is clear evidence to the contrary, to survive the Code's enactment and inform its application. See, *e.g.*, *Midlantic Nat'l Bank* v. *N.J. Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986); see also Pet. 16-17; Scholars' Br. 13-15. Here, the evidence is overwhelming—and (tellingly) not disputed by respondent—that § 541's drafters intended to leave *Segal* intact. See Pet. 17.

Finally, respondent's effort to obscure the importance of this case extends to his treatment of whether crop bailout payments (and similar interests) are included in the debtor's estate as "proceeds" under § 541(a)(6). Here, however, respondent concedes that "some number of district and bankruptcy courts have reached conclusions at odds" with both the decision below and the Fifth Circuit in *Burgess*. Opp. 16. Respondent's attempt to exclude the circuits from that conflict is unpersuasive; the Seventh and Tenth Circuits have squarely rejected the reasoning adopted by the Fifth and Eleventh Circuits here. See *infra* pp. 8-9. In any event, the acknowledged disarray among the district and bankruptcy courts is more than sufficient to justify this Court's review. Although this issue and those like it are potentially billion-dollar problems, they are likely to arise in circumstances (*i.e.*, just a few thousand dollars at a time) that will rarely justify costly litigation in the courts of appeals.

I. The Courts Of Appeals Are Deeply Divided On The Continuing Applicability Of *Segal*'s "Sufficiently Rooted" Test

1. Faced with the unequivocal declaration by the Eleventh Circuit below and the Fifth Circuit in *Burgess* that "'*Segal*'s "sufficiently rooted" test did not survive the enactment of the Bankruptcy Code'" (Pet. App. 12a (quoting *Burgess*, 438 F.3d at 498)), respondent makes two basic attempts to evade the resulting conflict. First, respondent denies that such a thing as the "sufficiently rooted" test even exists, claiming that *Segal*'s "specific holding" is just about the timing of tax refunds. Opp. 11. Second, respondent suggests that, to the extent there is any significance to the "sufficiently rooted" "language" in *Segal* (*id.* at 10), it stands for nothing more than what is (in his view) apparent on the face of § 541(a)(1). Both arguments are demonstrably false.

As everyone but respondent seems to recognize (see Opp. 10), *Segal* established a "sufficiently rooted" test for evaluating whether interests that become fully choate after a debtor files for bankruptcy should be included within the estate on the basis of pre-petition events. See, *e.g.*, *In re Shearin*, 224 F.3d 346, 351 (4th Cir. 2000); *In re Ryerson*, 739 F.2d 1423, 1426 (9th Cir. 1984). Even the majority opinions in the Eleventh Circuit below and the Fifth Circuit in *Burgess* candidly admitted (on the way to overruling *Segal*'s application post-Code) that *Segal* established such a test. Pet. App. 11a-12a; *Burgess*, 438 F.3d at 498. And certainly that fact was not lost on the eight dissenting judges in those cases, who complained about the majorities' rejection of *Segal*'s "sufficiently rooted" test. Pet. App. 27a (Pryor, J., dissenting); *Burgess*, 438 F.3d at 512-513 (Jones, C.J., dissenting). Respondent is understandably eager to abandon those courts' *reasoning* for rejecting *Segal*, see *infra* pp. 5-6, but he stands alone in claiming that *Segal* did not actually establish a "sufficiently rooted" test. Nor is his proposed formulation of *Segal*'s "specific holding" ("that the right to the tax refund at issue in that case arose pre-petition" (Opp. 11)) persuasive.

Segal is just about the timing of tax refunds only in the same way that *Lochner* v. *New York*, 198 U.S. 45 (1905), is just about the price of bread.

Respondent's alternative solution—that the "'sufficiently rooted' phraseology" (Opp. 11) is "functionally equivalent but verbally distinct" from the text of § 541(a)(1) (*id.* at 12)—both mischaracterizes *Segal* and misreads the plain text of the statute. *Segal* did not hold "that all *rights* that the debtor has as of the petition date—including *rights* that are contingent as of that time—are property of the bankruptcy estate." Opp. 2 (emphasis added). That is because the debtor in *Segal* had no "right" to the tax refund claim as of the petition date. *Segal*, 382 U.S. at 380 ("two key elements pointing toward realization of a refund existed [as of the petition date] * * *, [but] under the statutory scheme no refund could be claimed" until after the tax year had closed and any other income or losses were calculated). Had that been the case, the claim would have become property of the estate by simple operation of the Bankruptcy Act. See 11 U.S.C. § 110(a) (1961). That the *Segal* Court did not simply rest upon that statutory provision refutes respondent's claim (Opp. 10-11) that *Segal* "simply found the right to the tax refund at issue * * * arose pre-petition" (*id.* at 11) and confirms the importance of the "sufficiently rooted" test to the result in that case.

Likewise, the statute itself does not include within the estate only those "rights" (contingent or otherwise) that exist pre-petition. Rather, § 541(a)(1) deliberately employs the much broader term "interests" to reach situations—such as the bailout payments at issue here—where a debtor's legal right to future compensation is not yet established. Indeed, the hypothetical examples respondent offers to prove what properly belongs in the bankruptcy estate demonstrate the significance of the distinction between "rights" and "interests." For example, respondent concedes that a debtor who buys a lottery ticket, files for bankruptcy, and then wins the jackpot could not insulate his winnings from creditors' claims. Opp. 2. But, notwithstanding the fact that respon-

dent's chances of receiving a federal crop payment for pre-petition losses were far better than 1 in 146,000,000 (see http://www.powerball.com/powerball/pb_prizes.asp) on the petition date, he insists that the mere "hope or expectation [of a crop payment] is not enough to give rise to a cognizable property interest," even though payments were expressly based on pre-petition events. Opp. 8. In respondent's view, the salient difference between a debtor with a lottery ticket and a farmer who declares bankruptcy the day before the President signs a bailout bill into law is that in the former instance "the debtor held a *contractual right* to payment should certain contingencies occur." *Id.* at 6 (emphasis added). Perhaps that would be true if § 541(a)(1) actually employed the term "right" or "contract." It does not, and for good reason: Congress recognized (as did this Court in *Segal*) that in some instances an "interest" will be so tied to the pre-bankruptcy past to warrant inclusion in the estate.

Thus, the Fifth and Eleventh Circuits' approach is not merely "verbally distinct" from *Segal*'s "sufficiently rooted" test, but functionally opposed as well. Because respondent concedes (as he must) that "the *Segal* holding remains in force [in] the Second, Fourth, Sixth, and Ninth Circuits" (Opp. 11), the conflict over *Segal* is hardly "illusory."

2. Respondent's misguided focus on "rights" as opposed to "interests" requires him simply to ignore other decisions of this Court—both longstanding and modern—that apply a functional analysis in determining what constitutes property of the bankruptcy estate. Two venerable decisions of this Court—*Williams* v. *Heard*, 140 U.S. 529 (1891), and *Milnor* v. *Metz*, 41 U.S. (16 Pet.) 221 (1842)—reveal that this Court has long taken a flexible, fact-driven approach to such questions. In *Williams*, for example, the Court held that war claim premiums should be included in the estate even though the debtor had no pre-petition legal right to payment because "[t]here was * * * a possibility that the government would see that they were paid. There was a possibility of their being at some time valuable." *Williams*, 140 U.S. at 541. That Con-

gress had not created a legal "right" by the time of petitioning did not control whether the war claim premiums should be included in the estate. *Ibid.* Instead, the dispositive consideration was whether the premiums grew out of and were closely connected to the debtor's pre-petition interests. *Id.* at 540-541. Respondent does not even mention *Williams* or *Milnor*, much less explain how his analysis is consistent with those longstanding guideposts.

Likewise, this Court declined to adopt a "rigid" approach to defining the "interests" included in the bankruptcy estate after the Code's enactment. In *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), which respondent also fails to address, this Court included in the estate interests in property that, as of the petition date, had been seized by the government and *therefore were not even in the debtor's possession*. *Id.* at 199, 209. The Court further noted that, "[a]lthough [§ 541(a)(1)] could be read to limit the estate to those 'interests of the debtor in property' *at the time of the filing of the petition*," *id.* at 203, the provision was intended merely as a floor for what should be included in the estate, not as a ceiling. "[W]e view [the statutory words] as a [minimum for] what is included in the estate, rather than as a limitation." *Ibid.* That understanding cannot be squared with respondent's myopic focus on whether a "right" existed pre-petition.

3. As the *amici* bankruptcy scholars have observed, the ultimate question under both the old Bankruptcy Act and the present Bankruptcy Code is the meaning of the word "property," and the lack of "a substantial change from § 70a of the Bankruptcy Act [to] § 541(a) of the Bankruptcy Code * * * confirm[s] that Congress enacted at least as broad a definition of property in the [Code] as pre-existed in the [Act]." Scholars' Br. 14; see also *Segal*, 382 U.S. at 379 ("the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed"). Under the Code as well as the prior Act, this Court has consistently

construed "property" broadly, repeatedly rejecting the specific argument that an "interest" (such as respondent's crop losses) is not property because it appears valueless as of the commencement of the case. This Court has noted, for example, that "Congress' meaning" for the word property "was quite broad," including interests "'present or prospective,'" and has on that basis rejected a theory that exclusive interests are not property because they are of "no value." *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 207-208 (1988) (quoting *Northern Pac. Ry.* v. *Boyd*, 228 U.S. 482, 508 (1913)); see also *Bank of Am. N.T. & S.A.* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 454-455 (1999) ("It is to avoid just such [no-value] arguments that the law is settled that any otherwise cognizable property interest must be treated as sufficiently valuable to be recognized under the Bankruptcy Code."). Respondent's attempt to walk away from the rationale of the court of appeals—and substitute a theory that "property" and "interest" as used in the Code are the same as "rights"—is revolutionary in its own right, and is no reason to fail to review the evisceration by two courts of appeals of an important bankruptcy decision of this Court.

II. The Circuit, District, And Bankruptcy Courts Are Deeply Conflicted As To The Meaning Of "Proceeds" Under 11 U.S.C. § 541(a)(6)

1. Respondent does not dispute that the lower courts remain in disarray as to the meaning of "proceeds" under § 541(a)(6). Opp. 16. Indeed, the specific conflict presented here—whether crop-related payments obtained pursuant to an act of Congress passed after the debtor filed for bankruptcy (but conditioned on pre-petition events) belong to the debtor's estate—is well established, and has only deepened in recent years. See Pet. 18-25.

Instead, respondent claims that the conflict reaches only the district and bankruptcy courts and urges this Court to delay its resolution. Opp. 16-17. Respondent is mistaken as to the conflict's scope and, in any event, wrong that the

acknowledged split in the district and bankruptcy courts should be allowed to persist. First, respondent mischaracterizes the Tenth Circuit's holding in *In re Schneider*, 864 F.2d 683 (1988). The *Schneider* court's "narrow" holding that proceeds from a payment-in-kind scheme are not "proceeds" under § 541(a)(6) does not "support[] the decision of the Eleventh Circuit" (Opp. 15) that proceeds from a crop bailout program are also excluded from the estate. Contrary to respondent's categorical approach, the Tenth Circuit appreciated the distinction between the payout in *Schneider* and the type of payout at issue here, explicitly noting that "[a]gricultural entitlement payments which result from the actual disposition of a planted crop"—as is the case here—"are proceeds of that crop," whereas "payments based on an agreement not to plant crops arise from accounts or general intangibles," and do not fall within the meaning of § 541(a)(6). *Schneider*, 864 F.2d at 685 (emphasis added); see Pet. 19.

Respondent further claims that *In re Schmaling*, 783 F.2d 680 (7th Cir. 1986), is inapposite because that case involved "state law." Opp. 13. To the contrary, the question presented there was whether payments-in-kind "constitute crop 'proceeds' under the Uniform Commercial Code." *Schmaling*, 783 F.2d at 681. As we have explained (Pet. 20 n.7), courts consistently have confirmed the interrelationship between "proceeds" under the UCC and "proceeds" under the Bankruptcy Code, concluding that the former category is actually *narrower* than the latter. Thus, it follows that payments held to be "proceeds" under the UCC are necessarily "proceeds" under § 541(a)(6). See 5 Collier on Bankruptcy ¶ 541.17 ("[T]he scope of section 541(a)(6) is not limited to [the UCC] definition and will extend beyond it."); see also *Burgess*, 438 F.3d at 516 (Jones, C.J., dissenting) (recognizing *Schmaling*'s applicability in Bankruptcy Code cases); *Schneider*, 864 F.2d at 686 (same); *In re Ring*, 169 B.R. 73, 75 (Bankr. M.D. Ga. 1993), *aff'd* 160 B.R. 692 (M.D. Ga. 1993) (same); *In re White*, 1989 WL 146617 at *5 (Bankr. N.D. Iowa 1989) (unpublished) (same). The Seventh Circuit ultimately con-

cluded that the payments were not "proceeds" under the UCC because there was no crop grown, specifically contrasting payments-in-kind with "proceeds of an existing, failed crop." *Schmaling*, 783 F.2d at 683.

2. Even if the conflict included only the bankruptcy and district courts—and it is not so limited, for it is inconceivable that the Seventh and Tenth Circuits could join the Fifth and Eleventh Circuits on this issue—respondent's invitation to ignore the *undisputed* conflict in the bankruptcy and district courts (Opp. 16-17) is misguided. As a practical matter, those lower courts, which are responsible for applying these principles day-to-day, are no less in need of this Court's guidance simply because the proceeds issue has yet to arise throughout the courts of appeals. Moreover, the fact of the matter is that federal bailout payments, while totaling billions of dollars in a particular year (some $3.1 billion in 2003 alone, see U.S.D.A., Farm Serv. Agency, Fact Sheet: Agricultural Assistance Act of 2003, *available at* http://www.fsa.usda.gov/Internet/FSA_File/disasact03.pdf (2003)), only infrequently give rise to disputes that justify extended litigation in the courts of appeals. In fact, individual crop bailout payments are capped at $80,000 (see *ibid.*), so it is not surprising that debtors and trustees, having already traversed the bankruptcy and district courts, have seldom found it cost-effective to further litigate over such relatively small sums in the courts of appeals. Particularly in light of the participation of *pro bono* counsel here, this case presents the ideal (if uncommon) vehicle for resolving an issue of tremendous practical significance to the lower courts, as well as for correcting the larger conceptual flaws in the Eleventh and Fifth Circuits' opinions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 06-739

In the Supreme Court of the United States

WALTER W. KELLEY, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF RICKY WAYNE BRACEWELL,

Petitioner,

v.

RICKY WAYNE BRACEWELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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On Petition for a Writ of Certiorari
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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, Susan Block-Lieb, Ralph Brubaker, Jonathon C. Lipson, Nancy B. Rapoport, Robert K. Rasmussen, David Arthur Skeel, and Charles J. Tabb (the "*Amici*") hereby request leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the Court of Appeals for the Eleventh Circuit. Petitioner Walter W. Kelley has consented to the filing of this brief. Respondent Ricky Wayne Bracewell has not consented.

As set forth in the accompanying brief, the *Amici* are professors of law and have a deep interest in their proper interpretation and application of the bankruptcy laws. The Amici filed an amicus brief in *Burgess v.* Sikes, 438 F.3d

493 (5th Cir. 2006), concerning the same issued decided in the present case.

The *Amici* are greatly concerned that the Eleventh Circuit's incorrect interpretation of the Section 541(a) of the Bankruptcy Code, 11 U.S.C. §541(a), results in a limitation on the breadth of the term "property of the estate", which in turn limits the funds available to creditors of the debtor's estate and frustrates one of the primary bankruptcy policies of maximizing the debtor's estate for the benefit of creditors. Accordingly, the *Amici* respectfully request leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law.[2]

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[1] This brief has been prepared *pro bono*. Pursuant to Rule 37 of the Rules of this Court, the *Amici* file this brief with the written consent of both parties, which are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The *Amici* are Susan Block-Lieb, Professor of Law, Fordham Law School; Ralph Brubaker, Professor of Law and Associate Dean for Academic Affairs, University of Illinois College of Law; Jonathon C. Lipson, Associate Professor of Law, Temple University, James E.

They are deeply interested in this case because of the import[illegible] effect its outcome could have on the scope of property [illegible] a debtor's bankruptcy estate. The *Amici* file this *pro bono* brief to offer what assistance they can to the Court as it considers and decides whether the plain language of the Bankruptcy Code and longstanding precedents of this Court require that crop disaster payments paid on account of prepetition crop losses pursuant to postpetition legislation be included in the estate as property of the debtor as of the date on which the debtor's bankruptcy case was commenced.

In supporting Petitioner and seeking reversal of the decision of the Circuit Court, the *Amici* urge the Court to hold that the crop disaster payments are property of the estate under 11 U.S.C. §541(a)(6) as proceeds of the Debtor's property interest under 11 U.S.C. §541(a)(1) in the losses the debtor incurred before bankruptcy. This brief focuses on the statutory language of 11 U.S.C. §541(a) and the precedents of this Court, some of which predate the enactment of the Bankruptcy Code, and argues that those precedents continue to be controlling.

SUMMARY OF ARGUMENT

A debtor has a property interest in losses that are suffered prepetition. The Bankruptcy Code expressly provides in §541(a)(1) that all legal and equitable interests of the debtor in property as of the commencement of the bankruptcy case become property of the estate. The

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Beasely School of Law; Nancy B. Rapoport, Professor of Law, University of Houston Law Center; Robert K. Rasmussen, Milton Underwood Chair in Law, Vanderbilt University Law School; David Arthur Skeel, S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania Law School; and Charles J. Tabb, Alice Curtis Campbell Professor of Law, University of Illinois College of Law.

Bankruptcy Code further provides in §541(a)(6) that proceeds, product, offspring, rents, or profits of or from property of the estate also constitute property of the estate. Therefore, any payments, even those made after the bankruptcy filing, made on account of the prepetition losses incurred by the debtor are proceeds of those losses and constitute property of the estate.

This is in accord with the reasoning and holdings of long established precedents of this Court that a loss can itself have value and that party owns an interest in losses that it has suffered, even if there is no means of recompense at the time the loss is incurred. These precedents, while construing similar provisions of the Bankruptcy Act, the predecessor to today's Bankruptcy Code, retain their precedential value. Indeed, when Congress enacted the broad property provisions of §541(a), it gave no indication that it intended to depart from the established precedents and did not write on a clean slate.

In its decision, the Circuit Court wrongly restricted the plain meaning of property to only legal interests. In doing so it failed to give the proper recognition to the equitable interest that the Debtor held in the crop loss that he suffered prepetition. This crop loss resulted in the creditors' claims that the debtor sought to discharge in bankruptcy while retaining for himself the government reimbursement for those losses. The Circuit Court also wrongly held that this Court's precedents determining what constitutes property in the context of a bankruptcy estate under the Bankruptcy Act, do not apply under the Bankruptcy Code, even though Congress expressly made clear its intent to expand the concept of property when adopting §541(a).

ARGUMENT

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE REQUIRES THAT ALL PROPERTY, UNLESS SPECIFICALLY EXCLUDED, BE INCLUDED IN THE DEBTOR'S BANKRUPTCY ESTATE.

The plain language of §541(a) of the Bankruptcy Code determines the outcome of this case. Section 541(a) provides that

> [t]he commencement of a case . . . creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interest of the debtor in property as of the commencement of the case.

The statute means what it says; the estate is comprised of all property unless excluded by other subsections of §541. No such exclusion is relevant to this case. Thus, unless specifically excluded, any property, whether it be legal or equitable, that the debtor held prior to the commencement of the bankruptcy case becomes property of the estate. When enacting §541(a)(1), Congress stated that "[t]he scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act §70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act." H.R.Rep. No. 95-595, p. 367 (1977; S.Rep. No. 95-989, p. 82 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5868, 6323.

This broad interpretation of §541(a) is correct when viewed in light of other Bankruptcy Code provisions. For

various reasons Congress wrote §§541(b) and (c)(2) to except certain types of property from being property of the estate; property that otherwise would have been included as property of the estate under §541(a). Similarly, §522 of the Bankruptcy Code exempts certain types of property from liability for prepetition debts. *Owen v. Owen*, 500 U.S. 305, 308 (1991). "No property can be exempted [from the estate](and therefore immunized [from creditors' claims]), however, unless it first falls *within* the bankruptcy estate." *Id.* Therefore, property of the estate is so broad that it even includes property that is exempt from creditors' claims. *Stinnet v. Laplante (In re Stinnet)*, 465 F.3d 309, 313 (7th Cir. 2006).

Furthermore, even overencumbered property is included in property of the estate. *See Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (finding that a vehicle worth $4,000 and encumbered by a lien in the amount of $4,894.89 was property of the estate). Accordingly, even property that is burdensome to the estate or that is of inconsequential value to the estate constitutes estate property. *See* 11 U.S.C. §554(a) (providing that a trustee may abandon property of the estate in certain circumstances). When considered in reference to these other sections of the Bankruptcy Code, it is clear that all interests are included in the bankruptcy estate; except those specifically excluded in §541(b).

In *Bracewell v. Kelley*, the Eleventh Circuit failed to apply the plain meaning of the statutory text. Instead of recognizing that all legal or equitable interests are included in property of the estate, the Circuit Court focused its analysis on whether the Debtor had a remedy or a right to be compensated for the loss he suffered at the time he commenced his bankruptcy case, *i.e.* whether the debtor had a then-existing claim upon which he could have

brought suit. The court stated that "[n]ot until the enactment of the legislation elevated Bracewell's hope to *an entitlement* did it become an interest cognizable under §541(a)(1)." *Bracewell v. Kelley*, 454 F.3d 1234, 1239 (11th Cir. 2006) (emphasis added). The court went on to hold that "we look to state law to determine when a *claim* arises, and if it arises on or before the commencement of the bankruptcy case, it is part of the bankruptcy estate." *Id.* at 1242 (emphasis added). Finally, the court found that "[t]he crop loss was the result of an act of nature and by itself did not give rise to a *claim* against anyone. Bracewell had no right to be compensated until Congress enacted the legislation giving him a *right* and that did not occur until after he had filed for bankruptcy." *Id.* at 1244 (emphasis added).

The emphasized words above show that the Circuit Court clearly failed to apply the plain language of §541(a)(1). The statute does not require the debtor to have an existing claim; what is required is an interest, either legal or equitable. The Circuit Court equated an interest with the availability of compensation or a remedy. However, the Bankruptcy Code distinguishes the right to compensation or remedy by defining that right as a claim. 11 U.S.C. §101(5) defines a claim as a

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced

> to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Property, as used in §541, is thus not limited to rights to compensation or remedies. Rather, it is significantly more broad than simply a claim.

This Court should grant the Petition for Writ of Certiorari to resolve the Circuit Court's disregard for the clear requirements of the Bankruptcy Code that all property of a debtor, including property for which there is no value as of the commencement of the bankruptcy case, such as a crop loss, are property of the estate. A ruling by this Court would provide guidance as to the correct interpretation of the Bankruptcy Code and define the proper limits of property of the estate to the parameters intended by Congress; that all property of the debtor is included within property of the estate. By limiting the meaning of "property" to a right to compensation or a remedy, the Eleventh Circuit established a precedent that contingent property that is not presently capable of liquidation should not be included in a debtor's estate; even if it might prove to be of significant value in the future. This holding frustrates the goal of bankruptcy of maximizing the estate for future distribution to creditors.

II. SUPREME COURT PRECEDENTS REQUIRE THAT THE DEBTOR'S INTEREST IN THE CROP LOSS BE INCLUDED IN THE DEBTOR'S BANKRUPTCY ESTATE.

A. There are long-standing decisions of this Court that broadly interpret the term property.

Long standing precedents of this Court have interpreted the term "property" broadly when used in the context of a bankruptcy statute. The Bankruptcy Code itself does not

suggest that "property" should be understood in a special or narrow sense; on the contrary, the use of the term "all" counsels in favor of a broad interpretation. *Cf. Precision Industries v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 545 (7th Cir. 2003) (broadly interpreting the term "interest in such property" as used in §363(f) to include successor liability). The Circuit Court, however, held, without explanation, that this Court s precedents interpreting the term "property" are not binding after the enactment of the current Bankruptcy Code. Indeed, those precedents apply even more strongly within the Bankruptcy Code than under the earlier Bankruptcy Act because Congress intended §541(a) to broadly expand the size of estate property. Moreoever, the Circuit Court was incorrect in its narrow views of the scope of estate property under the former Bankruptcy Act.

In *Segal v. Rochelle*, this Court broadly interpreted §70a of the Bankruptcy Act, the precursor to §541 of the Bankruptcy code, stating that

> [t]he main thrust of §70a(5) is to secure for creditors everything of value that bankrupt may possess in alienable or leviable form when he files his petition. *To this end the term 'property' has been construed most generously* and an interest is not outside its reach because it is novel or contingent of because enjoyment must be postponed.

Segal v. Rochelle, 382 U.S. 375, 379 (1966) (emphasis added). Thus, property is a broad term, and encompasses all interest of the debtor.

In *Williams v. Heard*, 140 U.S. 529 (1891), a debtor suffered economic expense by paying enhanced war risk premiums during the Civil War. Subsequently the debtor

filed for bankruptcy. After the commencement of the bankruptcy case, by an act of Congress certain funds were made available to those entities that incurred the expense of enhanced premiums during the war. While the debtor had incurred expenses on account of these enhanced premiums, as of the date that he commenced his bankruptcy case he did not have "as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim." *Id.* at 538. This Court continued, finding that as of the time of his bankruptcy, "the claimant was remediless with respect to any proceeding which he might be able to retrench his losses." *Id.* at 540. Nonetheless, this Court held that the payments under the post-bankruptcy act of Congress were property of the debtor's bankruptcy estate, stating

> [t]here was thus at all time a possibility that the government would see that [the losses] were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the passage of the act of congress for the distribution of the fund. But the act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the act of congress did was to provide a remedy for the enforcement of the right.

Id. at 541. *Williams* makes clear that a loss constitutes property at the time of bankruptcy even thought there is no right to compensation or remedy until after the bankruptcy case is commenced. The Circuit Court was therefore

wrong in its conclusions that the crop loss could not constitute property of the estate.

Fifty years before deciding *Williams v. Heard*, this Court decided *Milnor v. Metz*, 41 U.S. 221 (1842), which the Circuit Court likewise erroneously declined to apply. In *Milnor*, the appellant, Milnor, commenced an insolvency proceding under a state statute pursuant to which an assignee for the benefit of his creditors was appointed to liquidate his "estate, effects and property" for distribution to creditors. Before commencing his insolvency proceeding, Milnor had worked for the government. Because of a congressional statute his duties had increased, and he accordingly requested Congress to pass a law compensating him for his additional services. Before Congress took any action on his request, Milnor filed his insolvency proceeding to obtain a discharge from his debts. Significantly, only after Milnor received his discharge in the proceeding did Congress pass the statute providing compensation for his additional prepetition services.

This Court held that the assignee in the insolvency proceeding was entitled to the payment made under the postpetition statute. This Court specifically rejected Milnor's contention that the chance of such a statute being enacted after he commenced his insolvency proceeding "was as uncertain as the pleasure of Congress," and that "until the [act of Congress] was passed no claim existed." Thus, at the time of filing his insolvency case, Milnor's only interest was an inchoate hope. This hope, however, was sufficient to be included as property of his insolvency estate and for the payment pursuant to the act of Congress to be proceeds of property of the insolvency estate.

Had the Circuit Court correctly applied the reasoning of *Segal*, *Williams*, and *Milnor*, to the present case, the court

would have held that the crop loss was property in which the Debtor had an interest. That interest became property of the estate upon the filing of the bankruptcy petition and the crop disaster payment constituted proceeds of the property, and thus property of the estate pursuant to §541(a)(6). The Circuit Court, however, attempted to distinguish these precedents because they pre-dated the enactment of the Bankruptcy Code. As shown above, the Circuit Court was wrong to distinguish these cases on those grounds because their precedential value was enhanced by Congress' broadening the scope of estate property under §541(a).

B. This Court's Bankruptcy Act decisions retain their precedential value when interpreting similar provisions of the Bankruptcy Code.

This Court's cases, cited above, broadly interpreting term property under the Bankruptcy Act, retain their precedential value in interpreting the same term under the Bankruptcy Code. "Congress could, of course, have intended a different interpretive method for reading terms used in the Bankruptcy Code it created in 1978. But if it had so intended we would expect some statutory indication." *U.S. v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 221 (1996) (noting that this Court's Bankruptcy Act practice of looking past the IRS label of an exaction as a tax, and determining whether the exaction was a tax for purposes of bankruptcy law, would continue under the Bankruptcy Code).

This Court found such a statutory indication in *United Bank v. Wolas*, 502 U.S. 151 (1991). In *Untied Bank* this Court was analyzing a preferential transfer under §547 of the Bankruptcy Code. The preference provision of the Bankruptcy Act was significantly narrower than under the

Bankruptcy Code. Accordingly, courts had developed the current expense rule to cover situations in which a debtor's payments on the eve of bankruptcy did not diminish the net estate because tangible assets were obtained in exchange for the payment. When Congress rewrote the preference provision in the Bankruptcy Code, it substantially enlarged the trustee's power to avoid preferential transfers. At the same time, Congress created a new exception for transfers made in the ordinary course of business. In light of these substantial changes in the preference provision, this Court held that Congress had made a deliberate choice to abandon the current expense rule.

By contrast, there was not a substantial change from §70a of the Bankruptcy Act and §541(a) of the Bankruptcy Code. In *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court held §541(a)(1) to encompass property that had been seized by a creditor before the debtor filed bankruptcy. This Court's interpretation, consistent with the broad interpretation of property under the Bankruptcy Act, eschewed a rigid limitation on §541(a)(1) and confirmed that Congress enacted at least as broad a definition of property in the Bankruptcy Code as pre-existed in the Bankruptcy Act.

The Circuit Court, nonetheless, held that "[t]he *Segal* decision told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property" and that *Williams* and *Milnor* both "predate the adoption of the Bankruptcy Code, and the critical language that we are interpreting, by a century of so" and were therefore not entitled to precedential deference. *Bracewell*, 454 F.3d at 1242, 1244. The Circuit Court failed to acknowledge, however, that "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate'" *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992), and that the treatment of property under the

Bankruptcy Act informs the courts understanding of the language of the Code. *Cf. Kelly v. Robinson*, 479 U.S. 36, 48 (1986) (comparing a Bankruptcy Act statute disallowing discharge of criminal liability with a similar provision of the Bankruptcy Code).

The Circuit Court therefore wrongly dismissed this Court's precedents in *Segal*, *Williams*, and *Milnor* as no longer binding. Without these cases to guide its analysis, the court narrowly interpreted §541(a). Guidance is needed from this Court to provide the courts, debtors, and practitioners with a standard by which they can gauge the value of Bankruptcy Act precedents in interpreting similar provisions of the Bankruptcy Code.